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Contents

Federal Register

Vol. 88, No. 248

Thursday, December 28, 2023

Separate Parts In This Issue

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR

Proclamations:

10688.....90083

7 CFR

205.....89539

8 CFR

106.....89539

12 CFR

3.....89820
4.....89820
6.....89820
19.....89820
108.....89820
109.....89820
112.....89820
150.....89820
165.....89820
238.....89820
263.....89820
308.....89820
747.....89820

14 CFR

13.....89551
39.....89568
383.....89551
406.....89551

Proposed Rules:

39 (3 documents) 89627, 89632, 89633

15 CFR

231.....89572

17 CFR

Proposed Rules:

43.....90046
45.....90046

26 CFR

Proposed Rules:

1.....89636

31 CFR

587.....89574

33 CFR

117.....89574
165 (4 documents) 89576, 89578, 89579
401.....89551

Proposed Rules:

110 (3 documents) 89644, 89646, 89648

40 CFR

52 (4 documents) 89582, 89587, 89589, 89593

41 CFR

Proposed Rules:

300–3.....89650
301–11.....89650
301–50.....89650
301–52.....89650
301–70.....89650
301–71.....89650
301–73.....89650

42 CFR

493.....89976

46 CFR

2.....89595
221.....89551
307.....89551
340.....89551
356.....89551

47 CFR

1.....89608
74.....89610

49 CFR

107.....89551
171.....89551
190.....89551
209.....89551
213.....89551
214.....89551
215.....89551
216.....89551
217.....89551
218.....89551
219.....89551
220.....89551
221.....89551
222.....89551
223.....89551
224.....89551
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231.....89551
233.....89551
234.....89551
235.....89551
236.....89551
237.....89551
238.....89551
239.....89551
240.....89551
241.....89551
242.....89551
243.....89551
244.....89551
272.....89551
386.....89551
578.....89551

50 CFR

17.....89611

Rules and Regulations

Federal Register
Vol. 88, No. 248
Thursday, December 28, 2023

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Doc. No. AMS–NOP–21–0073]

RIN 0581–AE06

National Organic Program (NOP); Organic Livestock and Poultry Standards; Correction

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Final rule; correction.

SUMMARY: The Agricultural Marketing Service (AMS) is correcting non-substantive errors in the regulatory text of the Organic Livestock and Poultry Standards (OLPS) final rule published on November 2, 2023. The corrections are intended to improve readability and clarity.

DATES: Effective January 12, 2024.

FOR FURTHER INFORMATION CONTACT: Erin Healy, Director, Standards Division; Telephone: (202) 720–3252; Email: *erin.healy@usda.gov.*

SUPPLEMENTARY INFORMATION: The OLPS final rule published on November 2, 2023 (88 FR 75394), delayed December 13, 2023 (88 FR 86259), amends the USDA organic regulations related to the production of livestock, including poultry, marketed as organic. This action corrects five errors in the OLPS regulatory text published on November 2, 2023, to improve the readability and clarity of the rule. The corrections do not change the meaning of the regulations.

Section 553 of the Administrative Procedure Act, 5 U.S.C.553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, an agency may issue a rule without providing notice and an opportunity for public comment. AMS has determined that there is good cause for making these corrections final without prior proposal and opportunity for comment because AMS is merely correcting minor non-substantive errors and omissions in the regulatory text. Accordingly, AMS finds that there is good cause to dispense with notice and public procedure under 5 U.S.C. 553(b)(B). With respect to the effective date, this final rule correction is not substantive in nature, and there is good cause to dispense with a 30-day delayed effective date. This final rule correction will be effective January 12, 2024, in conjunction with the entirety of the rule, as provided by FR Doc. 2023–27255 (88 FR 86259; December 13, 2023).

Corrections

In FR Doc. 2023–23726 appearing in the **Federal Register** of November 2, 2023, at 88 FR 75394, the following corrections are made:

§ 205.2 [Corrected]

■ 1. On page 75444, in the third column, in § 205.2, in the definition of *Cattle wattling,* ''The surgical separation of two layers of the skin from the connective tissue for along a 2-to-4-inch path'' is corrected to read ''The surgical separation of two layers of the skin from the connective tissue along a 2-to-4-inch path''.

§ 205.239 [Corrected]

■ 2. On page 75447, in the first column, in § 205.239, in paragraph (c)(4), ''provide each animal with an average of at least 30 percent DMI'' is corrected to read ''provide each animal with an average of at least 30 percent dry matter intake (DMI)''.

§ 205.241 [Corrected]

■ 3. On page 75447, in the second column, in § 205.241, in paragraph (a), ''including: year-round access to outdoors;'' is corrected to read, ''including: year-round access to the outdoors;''.

■ 4. On page 75447, in the third column, in § 205.241, in paragraph (b)(4)(i), ''a certifier may approve practices that provide less than 1 linear feet per 360 birds'' is corrected to read, ''a certifier may approve practices that provide less than 1 linear foot per 360 birds''.

■ 5. On page 75448, in the second column, in § 205.241, in paragraph (d)(8), ''For 4–H, National FFA Organization, and other youth projects, provided that temporary confinement for no more than one week prior to a fair or other demonstration,'' is corrected to read, ''For 4–H, National FFA Organization, and other youth projects, for no more than one week prior to a fair or other demonstration,''.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–28499 Filed 12–27–23; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 106

[CIS No. 2757–23; DHS Docket No. USCIS–2018–0003]

RIN 1615–ZC05

Adjustment to Premium Processing Fees

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is increasing premium processing fees charged by U.S. Citizenship and Immigration Services (USCIS) to reflect the amount of inflation from June 2021 through June 2023 according to the Consumer Price Index for All Urban Consumers. The adjustment increases premium processing fees from $1,500 to $1,685, $1,750 to $1,965, and $2,500 to $2,805.

DATES:

Effective date: This rule is effective on February 26, 2024.

Compliance date: Requests for premium processing postmarked on or after February 26, 2024 must include the new fee.

FOR FURTHER INFORMATION CONTACT: Carol Cribbs, Deputy Chief Financial Officer, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240–721–3000 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR—Code of Federal Regulations
CPI—Consumer Price Index

CPI–U—Consumer Price Index for All Urban Consumers DHS—Department of Homeland Security
E.O.—Executive Order
Form I–129—Petition for a Nonimmigrant Worker
Form I–140—Immigrant Petition for Alien Workers
Form I–539—Application to Extend/Change Nonimmigrant Status
Form I–765—Application for Employment Authorization
FY—Fiscal Year
INA—Immigration and Nationality Act
NEPA—National Environmental Protection Act
NIW—National Interest Waiver
SBREFA—Small Business Regulatory Enforcement Fairness Act of 1996
USCIS—U.S. Citizenship and Immigration Services
USCIS Stabilization Act—Emergency Stopgap USCIS Stabilization Act
USCIS Stabilization Rule—Implementation of the Emergency Stopgap USCIS Stabilization Act Final Rule, published March 30, 2022

I. Background and Authority

Section 286(u) of the INA, 8 U.S.C. 1356(u), provides the Secretary with authority to establish and collect a premium fee for the premium processing of certain immigration benefit types.[1] Premium processing means that DHS collects a fee in addition to the regular filing fee from persons seeking expedited processing of eligible immigration benefit requests.[2]

On October 1, 2020, the Continuing Appropriations Act, which included the Emergency Stopgap USCIS Stabilization Act (USCIS Stabilization Act), set new fees for premium processing of immigration benefit requests that had been designated for premium processing as of August 1, 2020, and expanded DHS authority to establish and collect new premium processing fees, and to use those additional funds for expanded purposes. *See* Emergency Stopgap USCIS Stabilization Act, Public Law 116–159, sec. 4102 (Oct. 1, 2020); INA sec. 286(u), 8 U.S.C. 1356(u).

On October 16, 2020, USCIS announced it would increase the fees for premium processing, as required by the USCIS Stabilization Act, effective October 19, 2020.[3] As of that date, the fee for Form I–907, Request for Premium Processing Service, increased from $1,440 to $2,500 for all immigration benefit requests that were designated for premium processing as of August 1, 2020, with the exception that the premium processing fee for petitioners filing Form I–129, Petition for a Nonimmigrant Worker, requesting H–2B or R–1 nonimmigrant status increased from $1,440 to $1,500. USCIS further announced that, while the USCIS Stabilization Act gave USCIS the ability to expand premium processing to additional forms and immigration benefit requests, USCIS was not yet taking such action and that any expansion of premium processing to other forms would be implemented as provided in the legislation.[4]

Effective May 31, 2022, DHS amended its premium processing regulations to codify the fees set by the USCIS Stabilization Act and establish new fees and processing timeframes consistent with the conditions and eligibility requirements set forth by section 4102(b)(1) of the USCIS Stabilization Act. *See* Final rule, *Implementation of the Emergency Stopgap USCIS Stabilization Act* (USCIS Stabilization Rule), 87 FR 18227 (Mar. 30, 2022); *see also* 8 CFR 106.4. The fees established by the USCIS Stabilization Act and codified by the USCIS Stabilization Rule were as follows:

- For all immigration benefit requests that were designated for premium processing as of August 1, 2020, increased from $1,440 to $2,500, with the exception that the premium processing fee for petitioners filing Form I–129, Petition for a Nonimmigrant Worker, requesting H–2B or R–1 nonimmigrant status increased from $1,440 to $1,500.[5]
- For those requesting premium processing for EB–1 immigrant classification as a multinational executive or manager or EB–2 immigrant classification as a member of professions with advanced degrees or exceptional ability seeking a national interest waiver (NIW) on Form I–140, Immigrant Petition for Alien Working, the fee was established as $2,500.[6]
- For those requesting premium processing of a change of status to F–1, F–2, J–1, J–2, M–1, or M–2 nonimmigrant status or a change of status to or extension of stay in E–1, E–2, E–3, H–4, L–2, O–3, P–4, or R–2 nonimmigrant status on Form I–539, Application to Extend/Change Nonimmigrant Status, the fee was established as $1,750;[7] and
- For those requesting premium processing for employment authorization on Form I–765, Application for Employment Authorization, the fee was established as $1,500.[8]

USCIS is now increasing those premium processing fees provided by Congress in the USCIS Stabilization Act and codified through the USCIS Stabilization Rule by the inflationary adjustment calculation provided by INA 286(u)(3)(C), 8 U.S.C. 1356(u)(3)(C). *See* USCIS Stabilization Act, Public Law 116–159 (Oct. 1, 2020).

II. Basis for Adjustment

Section 286(u)(3)(C) of the INA, 8 U.S.C. 1356(u)(3)(C), provides that DHS may adjust the premium fees on a biennial basis by the percentage by which the Consumer Price Index (CPI) for All Urban Consumers for the month of June preceding the date on which such adjustment takes effect exceeds the CPI for All Urban Consumers (CPI–U) for the same month of the second preceding calendar year. *See also* 8 CFR 106.4(d) (codifying section 286(u)(3)(C) of the INA, 8 U.S.C. 1356(u)(3)(C) in 8 CFR part 106, USCIS Fee Schedule).

The USCIS Stabilization Act established the current premium processing fees and the authority for DHS to adjust the premium fees on a biennial basis on October 1, 2020. DHS has not adjusted the statutory premium fees since October 1, 2020. As authorized by the USCIS Stabilization Act, DHS is now increasing the statutory premium fees as provided for by the USCIS Stabilization Act by the percentage by which the CPI–U for the month of June preceding the date on which such adjustment takes effect exceeds the CPI–U for the same month of the second preceding calendar year. This rule is effective on February 26, 2024, therefore ''the month of June preceding the date on which such adjustment takes effect'' is June 2023. As such, June 2021 is ''the same month of the second preceding calendar year,'' because it is two years before the June ''on which such adjustment takes effect.'' Therefore, DHS is using the CPI–U as of June 2023 as the end point and June 2021 as the starting point for the period of inflation to establish the new premium processing fees. In June

[1] ''Premium fees'' and ''premium processing fees'' are used interchangeably throughout this rule.

[2] *See* 8 CFR 1.2 for the definition of ''Benefit request''; *See* 8 CFR 106.4 for those immigration benefit requests currently eligible for premium processing.

[3] *See* USCIS, Premium Processing Fee Increase Effective Oct. 19, 2020, *https://www.uscis.gov/news/premium-processing-fee-increase-effective-oct-19-2020* (last visited July 19, 2023).

[4] *Id.*

[5] *See* USCIS Stabilization Act, Public Law 116–159 at sec. 4102(a) (codified as amended at 8 U.S.C. 1356(u)(3)(A) (Oct. 1, 2020); USCIS Stabilization Rule, 87 FR 18227,18231 (Mar. 30, 2022). *See also* 8 CFR 106.4(c).

[6] *See id.* at sec. 4102(b)(1)(A) (Oct. 1, 2020); USCIS Stabilization Rule, 87 FR 18227,18231 (Mar. 30, 2022). *See also* 8 CFR 106.4(c).

[7] *See id.* at sec. 4102(b)(1)(B)&(C) (Oct. 1, 2020); USCIS Stabilization Rule, 87 FR 18227,18231 (Mar. 30, 2022). *See also* 8 CFR 106.4(c).

[8] *See id.* at sec. 4102(b)(1)(D) (Oct. 1, 2020); USCIS Stabilization Rule, 87 FR 18227,18231 (Mar. 30, 2022). *See also* 8 CFR 106.4(c).

2021 the CPI–U was 271.696, and in June 2023 it was 305.109.[9] Therefore, between June 2021 and June 2023, the CPI–U increased by 12.30 percent.[10] When this percentage increase is applied to the current premium processing fees, the premium processing fees that were $1,500, increase to $1,685; the premium processing fees that were $1,750, increase to $1,965; and the premium processing fees that were $2,500, increase to $2,805.[11] *See* new 8 CFR 106.4(c).

A request for premium processing postmarked on or after February 26, 2024 must include the new fee. A premium processing request must be submitted on USCIS Form I–907, Request for Premium Processing, and in the manner prescribed by USCIS in the form instructions. If the request for premium processing is submitted together with the underlying immigration benefit request, all required fees in the correct amount must be paid. The fee to request premium processing service may not be waived and must be paid in addition to, and in a separate remittance from, other filing fees. *See* 8 CFR 106.4(b).

USCIS is adjusting current premium processing fees to ensure that the premium processing fees keep pace with inflation as contemplated by Congress in the USCIS Stabilization Act. It is USCIS' intention that premium processing fees will be adjusted biennially to consistently protect the real dollar value of the premium processing service that USCIS provides. When making an inflationary adjustment to the premium processing fees provided by INA 286(u)(3)(C), 8 U.S.C. 1356(u)(3)(C), the adjustment is limited to the percentage by which the CPI–U for the month of June preceding the date on which such adjustment takes effect exceeds the CPI–U for the same month of the second preceding calendar year. By consistently adjusting premium processing fees biennially USCIS will fully capture any increase in inflation that could be missed by increasing premium processing fees over periods of time greater than two years.

DHS will use the revenue generated by the premium processing fee increase to provide premium processing services; make improvements to adjudications processes; respond to adjudication demands, including reducing benefit request processing backlogs; and otherwise fund USCIS adjudication and naturalization services.

On January 4, 2023, DHS proposed new fees to replace its current fee schedule in its entirety. *See, U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 88 FR 402 (Jan. 4, 2023) (2023 Proposed Fee Rule).[12] The 2023 Proposed Fee Rule proposed to republish 8 CFR 106.4(c) *Designated benefit requests and fee amounts* as it was codified in the final rule entitled, ''Implementation of the Emergency Stopgap USCIS Stabilization Act,'' on March 30, 2022 without adjusting any of the fees for premium processing. *Id.* at 595. As the 2023 Proposed Fee Rule has not yet been finalized, this rule would replace the premium processing fees at 8 CFR 106.4(c) that were set by the USCIS Stabilization Act and codified in the USCIS Stabilization Rule. *See* new 8 CFR 106.4(c).

III. Regulatory Requirements

A. Administrative Procedure Act

The Administrative Procedure Act generally requires agencies to issue a proposed rule before issuing a final rule, subject to certain exceptions. *See* 5 U.S.C. 553(b). Section 286(u)(3)(C) of the INA, 8 U.S.C. 1356 (u)(3)(C), exempts DHS from the requirements of 5 U.S.C. 553. Section 286(u)(3)(C) of the INA, 8 U.S.C. 1356(u)(3)(C), specifically provides that ''the provisions of section 553 of Title 5 shall not apply to an adjustment authorized under [section 286(u)(3)(C) of the INA, 8 U.S.C. 1356(u)(3)(C)].'' Therefore, DHS is not required to issue a proposed rule when adjusting premium fees under section 286(u)(3)(C) of the INA, 8 U.S.C. 1356 (u)(3)(C).

The regulations at 8 CFR 106.4(d) provide that fees to request premium processing service may be adjusted by notice in the **Federal Register**. However, the Federal Register Act (44 U.S.C. 1510) and its implementing regulations (1 CFR part 21) provide that publishing a Notice document in the **Federal Register** announcing a new fee amount, without amending the regulations, does not effectuate a change of the Code of Federal Regulations (CFR). Because current premium processing fees are codified in the CFR, it is necessary for DHS to publish this rule to amend the regulatory text.

B. Other Regulatory Requirements

Because this action is not subject to the notice-and-comment requirements under the Administrative Procedure Act, a final regulatory flexibility analysis is not required. *See* 5 U.S.C. 604(a). This action is not subject to the written statement requirements of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Nor does it require prior consultation with State, local, and tribal government officials as specified by Executive Orders 13132 or 13175.

Executive Order 12988 (Civil Justice Reform)

This rule was drafted and reviewed in accordance with Executive Order (E.O.) 12988, Civil Justice Reform. DHS has determined that this final rule meets the applicable standards provided in section 3 of E.O. 12988.

National Environmental Policy Act

The Department is not aware of any significant impact on the environment, or any change in environment that would result from the changes in fees. The Department finds that promulgation of this rule clearly fits within categorical exclusion A3, as established in DHS's National Environmental Policy Act (NEPA) implementing procedures set forth in DHS's Directive 023–01, Revision 01, and Instruction Manual 023–01–001–01, Revision 01 (''Instruction Manual'') Appendix A, Table 1.

This rule is a standalone rule and is not part of any larger action. This rule would not result in any major Federal action that would significantly affect the quality of the human environment. Furthermore, the Departments have determined that no extraordinary circumstances exist that would create the potential for significant environmental effects. Therefore, this rule is categorically excluded from further NEPA review.

Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act)

The Congressional Review Act (CRA) was included as part of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) by section 804 of SBREFA, Public Law

[9] The latest CPI–U data is available at *http://data.bls.gov/cgi-bin/surveymost?bls* (last visited 07/27/2023). Select CPI–U 1982–84 = 100 (Unadjusted)—CUUR0000SA0 and click the Retrieve data button.

[10] DHS calculated this by subtracting the June 2021 CPI–U (271.696) from the June 2023 CPI–U (305.109), then dividing the result (33.413) by the June 2021 CPI–U (271.696). Calculation: $(305.109 - 271.696)/271.696 = .1230 \times 100 = 12.30$ percent.

[11] DHS generally rounds USCIS fees that it establishes by rulemaking to the nearest $5 increment. *See e.g.,* 81 FR 73292, 73303 (Oct. 24, 2016).

[12] On January 9, 2023, USCIS published a correction to the 2023 Proposed Fee Rule to correct two fees that were erroneous as the result of typographical errors. *See* U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; Correction, 88 FR 1172 (Jan. 9, 2023).

104–121, 110 Stat. 847, 868, *et seq.* The Office of Information and Regulatory Affairs has determined that this rule is a major rule as defined by the CRA. DHS has complied with the CRA's reporting requirements and has sent this final rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

Executive Order 12866

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget (OMB) has not designated this rule a ''significant regulatory action'' as defined under section 3(f) of E.O. 12866, as amended by Executive Order 14094. Accordingly, OMB has not reviewed this rule.

DHS estimates an additional annual transfer of $184,715,135 in revenue to be collected from fee-paying applicants and petitioners (public) to DHS, due to the increase in premium processing fees subject to an adjustment for inflation (Table 1).[13]

TABLE 1—SUMMARY OF PROVISIONS AND IMPACTS OF THE FINAL RULE

Rule provisions	Description of changes to provisions	Estimated annual form receipts	Estimated annual change in transfers
1. Form I–129, Petition for a Nonimmigrant Worker.	This rule increased the premium processing fees for Form I–129. The premium processing fee for H–2B and R–1 nonimmigrant status will increase from $1,500 to $1,685. The premium processing fee for all other available Form I–129 classifications (E–1, E–2, E–3, H–1B, H–3, L–1A, L–1B, LZ, O–1, O–2, P–1, P–1S, P–2, P–2S, P–3, P–3S, Q–1, TN–1, and TN–2) will increase from $2,500 to $2,805.	Form I–129 H–2B and R–1 Classifications: 10,892. All other Form I–129 Classifications: 310,146. Total Form I–129 receipts: 321,038.	This will result in an increase in transfer payments from the Form I–129 fee-paying population to DHS of $96,609,550.
2. Form I–140, Immigrant Petition for Alien Workers.	This rule increased the premium processing fees for Form I–140. The premium processing fee for employment-based (EB) classifications E11, E12, E21 (non-NIW), E31, E32, EW3, as well as recently available E13 and E21 (NIW), will increase from $2,500 to $2,805.	Form I–140 E11, E12, E21 (non-NIW), E31, E32, EW3 Classifications: 85,399. Form I–140 E13 and E21 (NIW) Classifications: 40,800. Total Form I–140 receipts: 126,199.	This will result in an increase in transfer payments from the Form I–140 fee-paying population to DHS of $38,490,695.
3. Form I–539, Application to Extend/Change Nonimmigrant Status.	This rule increased the premium processing fees for Form I–539 classifications F–1, F–2, M–1, M–2, J–1, J–2, E–1, E–2, E–3, L–2, H–4, O–3, P–4, and R–2. The premium processing fee for this population will increase from $1,750 to $1,965.	Form I–539 F–1, F–2, M–1, M–2, J–1, J–2 Classifications: 11,144. Form I–539 E–2, E–3, L–2, H–4, O–3, P–4, and R–2 Classifications: 71,160. Total Form I–539 receipts: 82,304.	This will result in an increase in transfer payments from the Form I–539 fee-paying population to DHS of $17,695,360.
4. Form I–765, Application for Employment Authorization.	This rule increased the premium processing fees for Form I–765. The premium processing fee for certain F–1 students will increase from $1,500 to $1,685.	Form I–765 OPT and OPT–STEM Classifications Currently Eligible: 114,116. Form I–765 Classifications Likely Eligible in the Future: 58,422. Total Form I–765 receipts: 172,538.	This will result in an increase in transfer payments from the Form I–765 fee-paying population to DHS of $31,919,530.

[13] Additional revenue collected calculation: $96,609,550 + $38,490,695 + $17,695,360 + $31,919,530 = $184,715,135 for forms I–129, I–140, I–539 and I–765, respectively.

In addition to the impacts summarized above, the table below presents the prepared accounting statement showing the costs and benefits to each individual affected by this final rule.[14]

OMB A–4 ACCOUNTING STATEMENT

[$ Millions, FY 2022; Time period: FY 2024 through FY 2025]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation
BENEFITS				
Monetized Benefits	N/A			Regulatory Impact Analysis ("RIA") See E.O. 12866.
Annualized quantified, but unmonetized, benefits	N/A	N/A	N/A	E.O. 12866.
Unquantified Benefits	N/A			E.O. 12866.
COSTS				
Annualized monetized costs (7%) Annualized monetized costs (3%)	N/A N/A	N/A N/A	N/A N/A	E.O. 12866.
Annualized quantified, but unmonetized, costs	N/A			
Qualitative (unquantified) costs	N/A			E.O 12866.
TRANSFERS				
Annualized monetized transfers	$184.7	N/A	N/A	E.O. 12866.
From whom to whom?	From the fee-paying applicants and petitioners of Form I–129, I–140, I–539, and I–765 to DHS.			
Qualitative (unquantified) transfers	None			None.
Miscellaneous Analyses/Category	*Effects*			*Source Citation.*
Effects on State, local, or tribal governments	None			None.
Effects on small businesses	None			None.
Effects on wages	None			None.
Effects on growth	None			None.

Table 2 shows the estimated total receipts received and refunds issued by USCIS for Form I–907, Request for Premium Processing Service, from fiscal year (FY) 2018 through FY 2022. Based on a 5-year annual average, DHS estimates the annual receipts for Form I–907 to be 406,437 for the biennial period after this rule takes effect. In addition, based on the 5-year average, the annual number of refunds issued for Form I–907 is estimated to be 297.[15]

TABLE 2—FORM I–907, REQUEST FOR PREMIUM PROCESSING SERVICE, RECEIPTS AND REFUNDS ISSUED, FY 2018 THROUGH FY 2022

FY	Form I–907 receipts			Form I–907 refunds*		
	Form I–129	Form I–140	Total	Form I–129	Form I–140	Total
2018	292,297	78,232	370,529	123	101	224
2019	333,175	79,752	412,927	259	48	307
2020	276,107	64,529	340,636	500	51	551
2021	309,596	107,908	417,504	89	126	215
2022	394,015	96,573	490,588	167	22	189
Total	1,605,190	426,994	2,032,184	1,138	348	1,486
5-year Annual Average	321,038	85,399	406,437	228	70	297

Source: USCIS, Office of Policy and Strategy, Policy Research Division, CLAIMS3 and ELIS database, July 18, 2023.

* **Note:** For refunds, the report reflects the most up-to-date data available at the time the system was queried. Any duplicate case information has been removed.

[14] White House, OMB, *Circular A–4* (April 6, 2023), available at *https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf* (last viewed Aug 3, 2023).

[15] USCIS presents data on refunds issued by USCIS because 8 CFR 106 guarantees processing for premium processing requests within 15, 30 or 45 days. The required period generally begins when USCIS properly receives the correct version of Form I–907, Request for Premium Processing Service, with fee, at the correct filing address or the date that all prerequisites for adjudication, the form prescribed by USCIS, and fee(s) are received by USCIS. Within the required period, USCIS will issue either an approval notice, denial notice, notice of intent to deny, or request for evidence, or open an investigation for fraud or misrepresentation.

Table 3 shows the percentage of the eligible Form I–129, Petition for Non-Immigrant Worker, petitioners who opted to submit a premium processing request along with their Form I–129 from FY 2018 through FY 2022. The 5-year annual average percentage of eligible Form I–129 petitioners who choose to submit a premium processing request was 57 percent.

TABLE 3—FORM I–907, REQUEST FOR PREMIUM PROCESSING SERVICE, FILED WITH FORM I–129, PETITION FOR A NONIMMIGRANT WORKER, FY 2018 THROUGH FY 2022

FY	Total Form I–129 receipts	Total Form I–129 petitions submitted with Form I–907	Percentage of Form I–907 receipts that come with Form I–129
2018	548,910	292,297	53
2019	551,789	333,175	60
2020	555,058	276,107	50
2021	531,851	309,596	58
2022	629,424	394,015	63
Total	2,817,032	1,605,190	
5-year Annual Average	563,406	321,038	57

Source: USCIS, Office of Policy and Strategy, Policy Research Division, CLAIMS3 and ELIS database, July 18, 2023.

Table 4 shows the percentage of the eligible Form I–140, Immigrant Petition for Alien Workers, petitioners who chose to submit a premium processing request from FY 2018 through FY 2022. Through FY 2022, not all Form I–140 petitioners are eligible for premium processing; therefore, DHS only discusses the percentage of those who are eligible for premium processing during these fiscal years compared to the total number of premium processing requests submitted.[16] The 5-year annual average percentage of eligible Form I–140 petitioners who chose to submit a premium processing request was 53 percent.

TABLE 4—FORM I–140 RECEIPTS ELIGIBLE FOR PREMIUM PROCESSING, FY 2018 THROUGH FY 2022

FY	Total Form I–140 petitions eligible for premium processing	Total Form I–140 petitions submitted with Form I–907	Percentage of Form I–907 receipts
2018	62,262	35,889	58
2019	70,215	34,958	50
2020	65,029	29,060	45
2021	112,521	65,685	58
2022	91,605	48,616	53
Total	401,632	214,208	
5-year Annual Average	80,326	42,842	53

Source: USCIS, Office of Policy and Strategy, Policy Research Division, CLAIMS3 and ELIS database, July 18, 2023.

Note: Form I–140 eligible petitioners include the following classifications are currently designated for premium processing: EB–1 Aliens of extraordinary ability (E11), EB–1 Outstanding professors and researchers (E12), EB–2 Members of professions with advanced degrees or exceptional ability not seeking a National Interest Waiver (E21), EB–3 Skilled workers (E31), EB–3 Professionals (E32), and EB–3 Workers other than skilled workers and professionals (EW3).

To estimate the probability that an eligible petitioner may choose to request premium processing, DHS computes a ratio of the 5-year annual average number of requests to the 5-year annual average number of eligible petitioners. Table 5 shows that of those currently eligible for premium processing, 57 percent chose to submit a premium processing request. Based on prior agency experience,[17] DHS assumes that the demand rate will carry forward and will use this percentage to estimate the possible adoption volumes of Form I–140, Immigrant Petition for Alien Workers, Multinational Executives and Managers (E–13) and Members of professions with advanced degrees or exceptional ability seeking a national interest waiver (E–21); [18] Form I–539, Application to Extend/Change Nonimmigrant Status; and I–765, Application for Employment Authorization, applicants.

[16] For more information on eligibility, please see ''How Do I Request Premium Processing?'' *https://www.uscis.gov/forms/all-forms/how-do-i-request-premium-processing* (last visited Aug 3, 2023).

[17] Table 7 in the ''Implementation of the Emergency Stopgap USCIS Stabilization Act'' rule at 87 FR 18241 shows that in FY 2021, when the fee was increased, Form I–129 petitioners were still willing to pay for premium processing. ''This provides suggestive evidence that petitioners' demand for premium processing is insensitive to the price increases effected by [the USCIS Stabilization] rule.''

[18] The USCIS Stabilization Act, codified by the USCIS Stabilization rule, established E–13 multinational executive and manager petitioner and E–21 national interest waiver petitioners eligible for premium processing. USCIS began accepting Form I–907 applications for these petitioners beginning January 30, 2023. *See https://www.uscis.gov/newsroom/alerts/uscis-announces-final-phase-of-premium-processing-expansion-for-eb-1-and-eb-2-form-i-140-petitions.* Because of the short time period USCIS has been accepting Form I–907 applications for these petitioners, USCIS uses the historical 5-year average of 57 percent submission rate to estimate their possible premium processing request adoption volumes.

TABLE 5—PERCENTAGE OF PREMIUM PROCESSING REQUESTS, FY 2018 THROUGH FY 2022

	5-year annual average of Forms submitted with Form I–907	5-year annual average of total receipts by Form	Percentage of Form I–907 receipts
Form I–129	321,038	563,406	57
Form I–140	42,842	80,326	53
Total	363,880	643,732	57

Source: USCIS Analysis.

(a) Form I–129, Petition for a Nonimmigrant Worker, Transfer Payments

Currently, petitioners requesting certain benefits on Form I–129, Petition for a Nonimmigrant Worker, are eligible to also submit a request for premium processing with their immigration benefit request. Table 6 shows the population of petitioners who submitted Form I–907 with Form I–129 based on the corresponding nonimmigrant classifications from FY 2018 through FY 2022.

Based on a 5-year annual average, DHS estimates the annual receipts from Form I–907 filed with Form I–129 H–2B or R–1 classifications to be 10,892. Based on a 5-year annual average, DHS estimates the annual receipts for Form I–907 associated with all other Forms I–129 to be 310,146.

TABLE 6—FORM I–907, REQUEST FOR PREMIUM PROCESSING SERVICE, FILED WITH FORM I–129, PETITION FOR A NONIMMIGRANT WORKER, FY 2018 THROUGH FY 2022

FY	Form I–129 H–2B or R–1 request receipts	Form I–129 all other visa request receipts *	Total Form I–907 receipts
2018	9,127	283,170	292,297
2019	10,505	322,670	333,175
2020	7,125	268,982	276,107
2021	11,866	297,730	309,596
2022	15,838	378,177	394,015
Total	54,461	1,550,729	1,605,190
5-year Annual Average	10,892	310,146	321,038

Source: USCIS, Office of Policy and Strategy, Policy Research Division, CLAIMS3 and ELIS database, July 18, 2023.

* **Note:** All other includes the following classifications: E–1, E–2, E–3, H–1B, H–2A, H–3, L–1A, L–1B, LZ, O–1, O–2, P–1, P–1S, P–2, P–2S, P–3, P–3S, Q–1, TN–1, and TN–2. H–2B or R–1 equals 3.4% and All other I–129 equals 96.6%. of Total Form I–907 Receipts filed with a Form I–129 petition.

This rule increases the premium processing fees for Form I–129. The premium processing fee for H–2B or R–1 nonimmigrant status will increase from $1,500 to $1,685, an increase of $185, which is the result of a 12.3 percent increase in the CPI–U from June 2021 to June 2023.[19] The premium fee for all other available Form I–129 classifications (E–1, E–2, E–3, H–1B, H–3, L–1A, L–1B, LZ, O–1, O–2, P–1, P–1S, P–2, P–2S, P–3, P–3S, Q–1, TN–1, and TN–2) will increase from $2,500 to $2,805, an increase of $305. Because the fee for premium processing for the Form I–129 H–2B and R–1 classifications will increase by a different amount than for all other Form I–129 classifications, the data for the Form I–129 H–2B and R–1 classifications data was separated from the data for all other classifications.

Based on a 5-year annual average, DHS estimates an additional $2,015,020 annually in transfer payments will be collected from these new, higher premium processing fees for Forms H–2B and R–1.[20] DHS will collect an additional $94,594,530 annually in transfer payments from premium processing requestors filing Form I–129 for all other visa classifications to DHS, based on a 5-year annual average.[21] Accordingly, DHS estimates the total increase in transfer payments from the Form I–129 fee-paying population to DHS will be $96,609,550 (Table 7) annually, for the biennial period after this rule takes effect.

[19] DHS calculated this by subtracting the June 2021 CPI–U (271.696) from the June 2023 CPI–U (305.109), then dividing the result (33.413) by the June 2021 CPI–U (271.696). Calculation: (305.109 − 271.696)/271.696 = .1230 × 100 = 12.3 percent.

[20] Calculation: 10,892 annual Form I–129 H–2B or R–1 petitions * $185 ($1,685 fee − $1,500 fee) = $2,015,020.

[21] Calculation: 310,146 annual Form I–129 petitions for other than H–2B and R–1 classifications * 305 ($2,805 fee − $2,500 fee) = $94,594,530.

TABLE 7—FEES FOR FORM I–907, REQUEST FOR PREMIUM PROCESSING SERVICE, FILED WITH FORM I–129, PETITION FOR A NONIMMIGRANT WORKER

Period of analysis	5-Year annual average receipts (FY 2018 through FY 2022)	Fee	Total annual fee revenue
Post-USCIS Stabilization Act (Baseline Costs)	10,892	$1,500	$16,338,000
2023 CPI–U Adjustment	10,892	1,685	18,353,020
Change in Transfer Payments for Form I–129 H–2B and R–1			2,015,020
Post-USCIS Stabilization Act (Baseline Costs)	310,146	2,500	775,365,000
2023 CPI–U Adjustment	310,146	2,805	869,959,530
Change in Transfer Payments for Form I–129 All Other*			94,594,530
Total Change in Transfer Payments for Form I–129			96,609,550

Source: USCIS Analysis.
* **Note:** All other includes the following classifications (E–1, E–2, E–3, H–1B, H–2A, H–3, L–1A, L–1B, LZ, O–1, O–2, P–1, P–1S, P–2, P–2S, P–3, P–3S, Q–1, TN–1, and TN–2).

(b) Form I–140, Immigrant Petition for Alien Worker, Transfer Payments

The estimated population of petitioners who submitted Form I–907, Request for Premium Processing Service, with Form I–140, Immigrant Petition for Alien Workers, based on the corresponding employment-based (EB) classifications that are currently designated for premium processing is 85,399 (Table 2) per year.[22] The fee for all Form I–140 petitioners requesting premium processing will increase from $2,500 to $2,805, based off the 12.3 percent increase in the CPI–U from June 2021 to June 2023.[23] Using the historical 5-year annual average from FY 2018 through FY 2022, DHS estimates that as a result of the increase in filing fees for premium processing the additional annual transfer payments from the Form I–140 fee-paying population to DHS will be $26,046,695 (Table 8) for the biennial period after this rule takes effect.

TABLE 8—FEES FOR FORM I–907, REQUEST FOR PREMIUM PROCESSING SERVICE, CURRENTLY FILED WITH FORM I–140, IMMIGRANT PETITION FOR ALIEN WORKERS*

Period of analysis	5-Year annual average receipts (FY 2018 through FY 2022)	Fee	Total annual fee revenue
Post-USCIS Stabilization Act (Baseline Costs)	85,399	$2,500	$213,497,500
2023 CPI–U Adjustment	85,399	2,805	239,544,195
Total Change in Transfer Payments for Form I–140			$26,046,695

Source: USCIS Analysis.
* **Note:** Classifications: E11, E12, E21 (non-NIW), E31, E32, EW3.

As of January 30, 2023, Form I–140 petitions under an E13 multinational executive and manager classification and petitions under an E21 national interest waiver (NIW) classification are eligible to request premium processing.[24] Table 9 shows the estimated E13 multinational executive and manager classification and E21 (NIW) classification populations that are now eligible for premium processing. Based on a 5-year annual average, DHS estimates the annual average receipts of Form I–140, E13 to be 11,752 and Form I–140, E21 to be 59,827 for a total of 71,579.

TABLE 9—FORM I–140, IMMIGRANT PETITION FOR ALIEN WORKERS, E13 AND E21 CLASSIFICATIONS, FY 2018 THROUGH FY 2022

FY	E13	E21 (NIW)	Total
2018	13,596	61,650	75,246
2019	12,489	65,718	78,207
2020	11,220	53,288	64,508
2021	10,279	55,991	66,270
2022	11,178	62,487	73,665
Total	58,762	299,134	357,896
5-year Annual Average	11,752	59,827	71,579

Sources: USCIS, Office of Policy and Strategy, Policy Research Division, CLAIMS3 and ELIS database, July 18, 2023.

[22] *See supra* FN 16.

[23] *See supra* FN 19.

[24] *See supra* FN 16.

Since E13 and E21 (NIW) Form I–140 applicants have only been recently eligible to request premium processing, DHS has no historical data to determine how many of the newly eligible population will take advantage of premium processing. Therefore, DHS uses the 57 percent average of Forms I–129 and Forms I–140 developed in Table 5, that request premium processing for this newly eligible population as a proxy. DHS is using the same methodology to estimate the transfers from the USCIS Stabilization Rule, because there is insufficient current data available for this population.[25]

Table 10 shows the total population by percentage for E13 and E21 (NIW) petitioners who may choose to file Form I–140. The estimated population of petitioners who are projected to submit Form I–907, Request for Premium Processing Service, with Form I–140, Immigrant Petition for Alien Workers, based on the corresponding E13 and E21 (NIW) classifications that were recently designated for premium processing is 40,800 (Table 10) per year.

TABLE 10—FORM I–140, IMMIGRANT PETITION FOR ALIEN WORKER, ESTIMATED ANNUAL AVERAGE PETITIONS FILED FOR PREMIUM PROCESSING, BY CLASSIFICATION, FY 2018 THROUGH FY 2022

Percent	E13	E21 (NIW)	Total
Estimate of Eligible Form I–140 Petitions (57%)	[A] 6,699	[B] 34,101	40,800

[A] Calculation: 6,699 = 11,752 (Table 9) × 0.57.
[B] Calculation: 34,101 = 59,827 (Table 9) × 0.57.
Source: USCIS Analysis.

Using this historical 5-year annual average from FY 2018 through FY 2022, DHS estimates that as a result of the increase in filing fees for premium processing the additional annual transfer payments from these Form I–140 fee-paying populations to DHS will be $12,444,000 (Table 11), for the biennial period after this rule takes effect.

TABLE 11—FEES FOR FORM I–907, REQUEST FOR PREMIUM PROCESSING SERVICE, CURRENTLY FILED WITH FORM I–140, IMMIGRANT PETITION FOR ALIEN WORKERS *

Period of analysis	5-Year Annual average receipts (FY 2018 through FY 2022)	Fee	Total annual fee revenue
Post-USCIS Stabilization Act (Baseline Costs)	40,800	$2,500	$102,000,000
2023 CPI–U Adjustment	40,800	2,805	114,444,000
Total Change in Transfer Payments for Form I–140			12,444,000

Source: USCIS Analysis.
* **Note:** Classifications: E13 and E21 (NIW).

Total estimated transfer payments for Form I–140, Immigrant Petition for Alien Worker, is $38,490,695 ($26,046,695 + $12,444,000) per year.

(c) Form I–539, Application To Extend/Change Nonimmigrant Status, Transfer Payments

The USCIS Stabilization Act authorized USCIS to permit premium processing for newly eligible Form I–539 filers. Per the statute, the fee was originally set at $1,750. In June 2023, USCIS announced eligibility for, F–1, F–2, J–1, J–2, M–1, and M–2 change of status filers.[26] This newly eligible population of filers are students and exchange visitors. Because premium processing was allowed for these classifications recently, DHS does not know how many currently eligible Form I–539 applicants will choose to submit a premium processing request. For purposes of this analysis, we present historical Form I–539 filing rates and use projections of the premium processing demand rates for Form I–129 and Form I–140 filers to estimate the change in transfer payments as a result of the inflationary adjustment.

Table 12 shows the 5-year annual average receipt volumes for the classifications that are now eligible for premium processing for FY 2018 through FY 2022. DHS estimates the 5-year annual average of the currently eligible F–1, F–2, J–1, J–2, M–1, M–2 classifications to be 19,550, and the 5-year annual average of the future eligible E–1, E–2, E–3, L–2, H–4, O–3, P–4, R–2 classifications to be 124,842.

TABLE 12—USCIS TOTAL OF FORM I–539, APPLICATION TO EXTEND/CHANGE NONIMMIGRANT STATUS, RECEIPTS BY CLASSIFICATION, FY 2018 THROUGH FY 2022

FY	F–1, F–2, J–1, J–2, M–1, M–2 Total	E–1, E–2, E–3, L–2, H–4, O–3, P–4, R–2 Total
2018	19,464	124,228
2019	17,565	123,528
2020	20,005	141,986

[25] *See* 87 FR 18227.

[26] *https://www.uscis.gov/newsroom/alerts/uscis-expands-premium-processing-for-applicants-seeking-to-change-into-f-m-or-j-nonimmigrant-status* (last visited Aug 3, 2023).

TABLE 12—USCIS TOTAL OF FORM I–539, APPLICATION TO EXTEND/CHANGE NONIMMIGRANT STATUS, RECEIPTS BY CLASSIFICATION, FY 2018 THROUGH FY 2022—Continued

FY	F–1, F–2, J–1, J–2, M–1, M–2 Total	E–1, E–2, E–3, L–2, H–4, O–3, P–4, R–2 Total
2021	16,645	124,055
2022	24,072	110,414
Total	97,751	624,211
5-year Annual Average	19,550	124,842

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), CLAIMS3 and ELIS database, July 18, 2023.

DHS calculated that 19,550 of the 144,392 newly eligible applicants would be applying for F–1, F–2, J–1, J–2, M–1, M–2 classifications (14%), and the remaining 124,842 would be applying for E–1, E–2, E–3, L–2, H–4, O–3, P–4, R–2 classifications (86%). DHS uses the 57 percent averages of those requesting premium processing for Forms I–129 and I–140 for the newly eligible Form I–539 population as a proxy.

Of the 19,550 newly eligible applicants for F–1, F–2, J–1, J–2, M–1, M–2 classifications per year, DHS estimates that 11,144 applicants (57 percent of the eligible population, rounded) may submit a premium processing request along with their Form I–539 application. Of the 124,842 newly eligible applicants for E–1, E–2, E–3, L–2, H–4, O–3, P–4, R–2 classifications per year, DHS estimates that 71,160 applicants (57 percent of the eligible population, rounded) may submit a premium processing request along with their Form I–539 application as shown in Table 13.

TABLE 13—ESTIMATED ANNUAL AVERAGE PREMIUM PROCESSING REQUESTS FOR FORM I–539, APPLICATION TO EXTEND/CHANGE NONIMMIGRANT STATUS

Classification type	Form I–539 5-year annual average receipts (FY 2018 through FY 2022)	Pct. requesting prem. proc.	Total
F–1, F–2, J–1, J–2, M–1, M–2 classifications	19,550	57	11,144
E–1, E–2, E–3, L–2, H–4, O–3, P–4, R–2 classifications	124,842	57	71,160
Total			82,304

Source: USCIS, Office of Policy and Strategy, Policy Research Division, CLAIMS3 and ELIS database, July 18, 2023.

The fee for all Form I–539 petitioners requesting premium processing will increase from $1,750 to $1,965, based off of the 12.3 percent increase in the CPI–U from June 2021 to June 2023.[27] Using the estimated premium processing requests developed in Table 13 above. In Table 14, DHS estimates the increase in filing fees for premium processing results in annual transfer payments from the Form I–539 fee-paying population to DHS of $17,695,360, for the biennial period after this rule takes effect.

TABLE 14—FEES FOR FORM I–907, REQUEST FOR PREMIUM PROCESSING SERVICE, CURRENTLY FILED WITH FORM I–539, APPLICATION TO EXTEND/CHANGE NONIMMIGRANT STATUS

Period of analysis	5-Year annual average receipts (FY 2018 through FY 2022)	Fee	Total annual fee revenue
F–1, F–2, J–1, J–2, M–1, M–2 classifications:			
Post-USCIS Stabilization Act (Baseline Costs)	11,144	$1,750	$19,502,000
2023 CPI–U Adjustment	11,144	1,965	21,897,960
Total Transfer Payments			2,395,960
E–1, E–2, E–3, L–2, H–4, O–3, P–4, R–2 classifications:			
Post-USCIS Stabilization Act (Baseline Costs)	71,160	1,750	124,530,000
2023 CPI–U Adjustment	71,160	1,965	139,829,400
Total Transfer Payments			15,299,400
Total Change in Transfer Payments for Form I–539			17,695,360

Source: USCIS Analysis.

[27] *See supra* FN 19.

(d) Form I–765, Application for Employment Authorization, Transfer Payments

The USCIS Stabilization Act authorized USCIS to permit premium processing of the Form I–765, Application for Employment Authorization. The USCIS Stabilization Act set the fee for the premium processing of Form I–765 at $1,500.[28] USCIS began premium processing for Forms I–765 for students applying for Optional Practical Training (OPT) and students seeking science, technology, engineering, and mathematics (STEM) OPT extensions in March 2023.[29]

Table 15 shows the estimated OPT and STEM–OPT populations that are now eligible as well as the estimated population of other I–765 categories the USCIS Stabilization Rule projected to become eligible for premium processing in the near future. Based on a 5-year annual average, DHS estimates the annual average receipts of Form I–765 from the OPT and STEM–OPT populations to be 200,204 for the biennial period after this rule takes effect. Additionally, DHS estimates the annual average receipts to be 102,495 from additional categories of Form I–765 that are likely to become eligible for premium processing in the future.[30] This population is included in Table 15 because Form I–765 categories that become eligible in the near future may be impacted by the inflationary adjustments discussed in this rule. The USCIS Stabilization Rule's Regulatory Impact Analysis further projected 1,136,691 annual Form I–765 receipts belonging to classifications for which USCIS will consider, but has no immediate plans to expand premium processing eligibility as well as a final group of 802,145 belonging to I–765 classifications USCIS is unlikely to ever make eligible for premium processing.[31] These projected groups are excluded from Table 15 and this Rule's analysis because they are unlikely to be impacted by the decision to adjust premium processing fees for inflation over this biennial cycle. These impacts would be more appropriately quantified in a future inflation adjustment rule, when some reasonable expectation exists that premium processing eligibility is likely in the future.

TABLE 15—FORM I–765, APPLICATION FOR EMPLOYMENT AUTHORIZATION, CLASSIFICATIONS BY IMPLEMENTATION, FY 2017 THROUGH FY 2022

FY	Form I–765 OPT and STEM–OPT receipts currently eligible	Form I–765 receipts likely eligible in the future
2017	.....	96,806
2018	225,277	100,316
2019	215,212	110,743
2020	198,498	110,449
2021	173,773	94,160
2022	188,258	.....
Total	1,001,018	512,474
5-year Annual Average	200,204	102,495

Sources: USCIS, Office of Policy and Strategy, Policy Research Division, CLAIMS3 and ELIS database, July 18, 2023; Implementation of the Emergency Stopgap USCIS Stabilization Act, 87 FR 18227 (Mar. 30, 2022).

Since Form I–765 OPT and STEM–OPT applicants have only been recently eligible to request premium processing, DHS has no historical data to determine how many of the newly eligible population will take advantage of premium processing. Therefore, DHS uses the 57 percent average of Forms I–129 and I–140 developed in Table 5, that request premium processing for this newly eligible population as a proxy for all eligible Form I–765 categories. DHS used the same methodology to estimate the transfers from the USCIS Stabilization Rule.

DHS estimates that 114,116 applicants (57 percent of the eligible population) out of the 200,204 (Table 15) Form I–765 OPT and STEM–OPT applicants who apply annually may submit a premium processing request with their Form I–765 application.[32] DHS also estimates that 58,422 applicants (57 percent of the eligible population) out of the 102,495 (Table 15) employment authorization document applicants who apply annually may become eligible to submit a premium processing request with their Form I–765 application in the near future.[33]

In Table 16, DHS uses the 114,116 and 58,422 population estimates from OPT and OPT–STEM population as well as the likely future eligible Form I–765 population to DHS to estimate transfer payments for each category. The fee for all Form I–765 applicants requesting premium processing will increase from $1,500 to $1,685, based off the 12.3 percent increase in the CPI–U from June 2021 to June 2023.[34] DHS estimates that annual transfer payments from currently eligible OPT and OPT–STEM Form I–765 applicants requesting premium processing using Form I–907 will be $21,111,460 to DHS for the biennial period after this rule takes effect. DHS estimates that annual transfer payments from likely future eligible will be $10,808,070 to DHS. Accordingly, DHS estimates that total annual transfer payments from Form I–765 applicants requesting request premium processing using Form I–907 will be $31,919,530 to DHS.

[28] *See* USCIS Stabilization Act, Public Law 116–159 at sec. 4102(b)(1)(D)(Oct. 1, 2020). *See also* 8 CFR 106.4(c).

[29] *See https://www.uscis.gov/newsroom/news-releases/uscis-announces-premium-processing-new-online-filing-procedures-for-certain-f-1-students-seeking-opt (last visited Aug. 3, 2023).*

[30] *See* Implementation of the Emergency Stopgap USCIS Stabilization Act, 87 FR 18227 (Mar. 30, 2022) *https://www.federalregister.gov/documents/2022/03/30/2022-06742/implementation-of-the-emergency-stopgap-uscis-stabilization-act#h-34.*

[31] The Implementation of the Emergency Stopgap USCIS Stabilization Act Final Rule, published March 30, 2022 estimated the number of newly eligible applicants beginning around FY 2025 based on data from FY 2017 through FY 2021 actuals. This still serves as a reasonable measure should this population become available for premium processing in the near future. *See* 87 FR 18250.

[32] Calculation: 200,204 applicants * 57 percent = 114,116.

[33] Calculation: 102,495 applicants * 57 percent = 58,422.

[34] *See supra* FN 19.

TABLE 16—FEES FOR FORM I–765, APPLICATION FOR EMPLOYMENT AUTHORIZATION, APPLICANTS REQUESTING PREMIUM PROCESSING USING FORM I–907, REQUEST FOR PREMIUM PROCESSING SERVICE

Period of analysis	5-Year annual average receipts (FY 2018 through FY 2022)	Fee	Total annual fee revenue
Form I–765 OPT and OPT–STEM Receipts Currently Eligible:			
Post-USCIS Stabilization Act (Baseline Costs)	114,116	$1,500	$171,174,000
2023 CPI–U Adjustment	114,116	1,685	192,285,460
Total Transfer Payments			21,111,460
Period of analysis	5-year annual average receipts (FY 2017 through FY 2021)	Fee	Total
Form I–765 Receipts Likely Eligible in the Future:			
Post-USCIS Stabilization Act (Baseline Costs)	58,422	$1,500	$87,633,000
2023 CPI–U Adjustment	58,422	1,685	98,441,070
Total Transfer Payments			$10,808,070
Total Change in Transfer Payments for Form I–765			$31,919,530

Source: USCIS Analysis.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–12, DHS must submit to OMB, for review and approval, any reporting requirements inherent in a rule unless they are exempt. This rule does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act. USCIS will update the fee for filing USCIS Form I–907 as appropriate.

List of Subjects in 8 CFR Part 106

Fees, Immigration.

For the reasons set out in the preamble, the Department of Homeland Security amends 8 CFR part 106 as follows:

PART 106—USCIS FEE SCHEDULE

■ 1. The authority citation for part 106 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1254a, 1254b,1304, 1356; Pub. L.107-296; 48 U.S.C 1806; Pub. L. 115–218; Pub. L. 116–159.

■ 2. Section 106.4 is amended by revising paragraph (c) to read as follows:

§ 106.4 Premium processing service.

* * * * *

(c) Designated benefit requests and fee amounts. Benefit requests designated for premium processing and the corresponding fees to request premium processing service are as follows:

(1) Application for classification of a nonimmigrant described in section 101(a)(15)(E)(i), (ii), or (iii) of the INA—$2,805.

(2) Petition for classification of a nonimmigrant described in section 101(a)(15)(H)(i)(b) of the INA or section 222(a) of the Immigration Act of 1990, Public Law 101–649—$2,805.

(3) Petition for classification of a nonimmigrant described in section 101(a)(15)(H)(ii)(b) of the INA—$1,685.

(4) Petition for classification of a nonimmigrant described in section 101(a)(15)(H)(iii) of the INA—$2,805.

(5) Petition for classification of a nonimmigrant described in section 101(a)(15)(L) of the INA—$2,805.

(6) Petition for classification of a nonimmigrant described in section 101(a)(15)(O)(i) or (ii) of the INA—$2,805.

(7) Petition for classification of a nonimmigrant described in section 101(a)(15)(P)(i), (ii), or (iii) of the INA—$2,805.

(8) Petition for classification of a nonimmigrant described in section 101(a)(15)(Q) of the INA—$2,805.

(9) Petition for classification of a nonimmigrant described in section 101(a)(15)(R) of the INA—$1,685.

(10) Application for classification of a nonimmigrant described in section 214(e) of the INA—$2,805.

(11) Petition for classification under section 203(b)(1)(A) of the INA—$2,805.

(12) Petition for classification under section 203(b)(1)(B) of the INA—$2,805.

(13) Petition for classification under section 203(b)(2)(A) of the INA not involving a waiver under section 203(b)(2)(B) of the INA—$2,805.

(14) Petition for classification under section 203(b)(3)(A)(i) of the INA—$2,805.

(15) Petition for classification under section 203(b)(3)(A)(ii) of the INA—$2,805.

(16) Petition for classification under section 203(b)(3)(A)(iii) of the INA—$2,805.

(17) Petition for classification under section 203(b)(1)(C) of the INA—$2,805.

(18) Petition for classification under section 203(b)(2) of the INA involving a waiver under section 203(b)(2)(B) of the INA—$2,805.

(19) Application under section 248 of the INA to change status to a classification described in section 101(a)(15)(F), (J), or (M) of the INA—$1,965.

(20) Application under section 248 of the INA to change status to be classified as a dependent of a nonimmigrant described in section 101(a)(15)(E), (H), (L), (O), (P), or (R) of the INA, or to extend stay in such classification—$1,965.

(21) Application for employment authorization—$1,685.

* * * * *

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2023–28529 Filed 12–27–23; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 13 and 406

Office of the Secretary

14 CFR Part 383

Great Lakes St. Lawrence Seaway Development Corporation

33 CFR Part 401

Maritime Administration

46 CFR Parts 221, 307, 340, and 356

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 107, 171, and 190

Federal Railroad Administration

49 CFR Parts 209, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 227, 228, 229, 230, 231, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, and 272

Federal Motor Carrier Safety Administration

49 CFR Part 386

National Highway Traffic Safety Administration

49 CFR Part 578

RIN 2105–AF16

Revisions to Civil Penalty Amounts, 2024

AGENCY: Department of Transportation (DOT or the Department).

ACTION: Final rule.

SUMMARY: This final rule provides the statutorily prescribed 2024 adjustment to civil penalty amounts that may be imposed for violations of certain DOT regulations.

DATES: This rule is effective December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Elizabeth Kohl, Attorney-Advisor, Office of the General Counsel, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590, 202–366–7253; *elizabeth.kohl@dot.gov*.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

This rule implements the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), Public Law 101–410, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), Public Law 114–74, 129 Stat. 599, codified at 28 U.S.C. 2461 note. The FCPIAA and the 2015 Act require Federal agencies to adjust minimum and maximum civil penalty amounts to preserve their deterrent impact. The 2015 Act amended the formula and frequency of the adjustments. It required an initial catch-up adjustment in the form of an interim final rule, followed by annual adjustments of civil penalty amounts using a statutorily mandated formula. Section 4(b)(2) of the 2015 Act specifically directs that the annual adjustment be accomplished through final rule without notice and comment. This rule is effective immediately.

The Department's authorities over the specific civil penalty regulations being amended by this rule are provided in the preamble discussion below.

I. Background

On November 2, 2015, the President signed into law the 2015 Act, which amended the FCPIAA, to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The 2015 Act requires Federal agencies to: (1) adjust the level of civil monetary penalties with an initial ''catch-up'' adjustment through an interim final rule (IFR); and (2) make subsequent annual adjustments.

The 2015 Act directed the Office of Management and Budget (OMB) to issue guidance on implementing the required annual adjustment no later than December 15 of each year.[1] OMB released this required guidance in OMB Memorandum M–24–07, available at *https://www.whitehouse.gov/omb/information-for-agencies/memoranda/*, which provides instructions on how to calculate the 2024 annual adjustment. To derive the 2024 adjustment, the Department must multiply the maximum or minimum penalty amount by the percent change between the October 2023 Consumer Price Index for All Urban Consumers (CPI–U) and the October 2022 CPI–U. In this case, as explained in OMB Memorandum M–24–07 the percent change between the October 2023 CPI–U and the October 2022 CPI–U is 1.03241.[2]

II. Issuance of a Final Rule

This final rule is being published without notice and comment and with an immediate effective date. The 2015 Act provides clear direction for how to adjust the civil penalties, and clearly states at section 4(b)(2) that this adjustment shall be made ''notwithstanding section 553 of title 5, United States Code.'' By operation of the 2015 Act, DOT must publish an annual adjustment by January 15 of every year, and the new levels take effect upon publication of the rule. Accordingly, DOT is publishing this final rule without prior notice and comment, and with an immediate effective date.

III. Discussion of the Final Rule

In 2016, OST and DOT's operating administrations with civil monetary penalties promulgated the ''catch up'' IFR required by the 2015 Act. All DOT operating administrations have already finalized their ''catch up'' IFRs, and this rule makes the annual adjustment required by the 2015 Act.

The Department emphasizes that this rule adjusts penalties prospectively, and therefore the penalty adjustments made by this rule will apply only to violations that take place after this rule becomes effective. This rule also does not change previously assessed or enforced penalties that DOT is actively collecting or has collected.

A. Office of the Secretary (OST) 2024 Adjustments

OST's 2024 civil penalty adjustments are summarized in the chart below.

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
General civil penalty for violations of certain aviation economic regulations and statutes	49 U.S.C. 46301(a)(1)	$40,272	$41,577
General civil penalty for violations of certain aviation economic regulations and statutes involving an individual or small business concern.	49 U.S.C. 46301(a)(1)	1,771	1,828

[1] 28 U.S.C. 2461 note.

[2] Agencies may calculate the percent change using the CPI–U numbers, which are typically issued in November each year, and confirm their calculations upon issuance of the annual OMB guidance.

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
Civil penalties for individuals or small businesses for violations of most provisions of Chapter 401 of Title 49, including the anti-discrimination provisions of sections 40127 and 41705 and rules and orders issued pursuant to these provisions.	49 U.S.C. 46301(a)(5)(A)	16,108	16,630
Civil penalties for individuals or small businesses for violations of 49 U.S.C. 41719 and rules and orders issued pursuant to that provision.	49 U.S.C. 46301(a)(5)(C)	8,054	8,315
Civil penalties for individuals or small businesses for violations of 49 U.S.C. 41712 or consumer protection rules and orders issued pursuant to that provision.	49 U.S.C. 46301(a)(5)(D)	4,028	4,159

B. Federal Aviation Administration (FAA) 2024 Adjustments

FAA's 2024 civil penalty adjustments are summarized in the chart below.

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
Violation of hazardous materials transportation law	49 U.S.C. 5123(a)(1)	$96,624	$99,756
Violation of hazardous materials transportation law resulting in death, serious illness, severe injury, or substantial property destruction.	49 U.S.C. 5123(a)(2)	225,455	232,762
Minimum penalty for violation of hazardous materials transportation law relating to training	49 U.S.C. 5123(a)(3)	582	601
Maximum penalty for violation of hazardous materials transportation law relating to training	49 U.S.C. 5123(a)(3)	96,624	99,756
Knowing presentation of a nonconforming aircraft for issuance of an initial airworthiness certificate by a production certificate holder.	49 U.S.C. 44704(d)(3)(B)	1,144,489	1,181,582
Knowing failure by an applicant for or holder of a type certificate to submit safety critical information or include certain such information in an airplane flight manual or flight crew operating manual contrary to 49 U.S.C. 44704(e)(1)–(3).	49 U.S.C. 44704(e)(4)(A)	1,144,489	1,181,582
Operation of an unmanned aircraft or unmanned aircraft system equipped or armed with a dangerous weapon.	49 U.S.C. 44802 note	29,462	30,417
Violation by a person other than an individual or small business concern under 49 U.S.C. 46301(a)(1)(A) or (B).	49 U.S.C. 46301(a)(1)	40,272	41,577
Violation by an airman serving as an airman under 49 U.S.C. 46301(a)(1)(A) or (B) (but not covered by 46301(a)(5)(A) or (B)).	49 U.S.C. 46301(a)(1)	1,771	1,828
Violation by an individual or small business concern under 49 U.S.C. 46301(a)(1)(A) or (B) (but not covered in 49 U.S.C. 46301(a)(5)).	49 U.S.C. 46301(a)(1)	1,771	1,828
Violation by an individual or small business concern (except an airman serving as an airman) under 49 U.S.C. 46301(a)(5)(A)(i) or (ii).	49 U.S.C. 46301(a)(5)(A)	16,108	16,630
Violation by an individual or small business concern related to the transportation of hazardous materials.	49 U.S.C. 46301(a)(5)(B)(i)	16,108	16,630
Violation by an individual or small business concern related to the registration or recordation under 49 U.S.C. chapter 441, of an aircraft not used to provide air transportation.	49 U.S.C. 46301(a)(5)(B)(ii)	16,108	16,630
Violation by an individual or small business concern of 49 U.S.C. 44718(d), relating to limitation on construction or establishment of landfills.	49 U.S.C. 46301(a)(5)(B)(iii)	16,108	16,630
Violation by an individual or small business concern of 49 U.S.C. 44725, relating to the safe disposal of life-limited aircraft parts.	49 U.S.C. 46301(a)(5)(B)(iv)	16,108	16,630
Individual who aims the beam of a laser pointer at an aircraft in the airspace jurisdiction of the United States, or at the flight path of such an aircraft.	49 U.S.C. 46301 note	30,820	31,819
Tampering with a smoke alarm device	49 U.S.C. 46301(b)	5,171	5,339
Knowingly providing false information about alleged violation involving the special aircraft jurisdiction of the United States.	49 U.S.C. 46302	28,085	28,995
Physical or sexual assault or threat to physically or sexually assault crewmember or other individual on an aircraft, or action that poses an imminent threat to the safety of the aircraft or individuals on board.	49 U.S.C. 46318	42,287	43,658
Permanent closure of an airport without providing sufficient notice	49 U.S.C. 46319	16,108	16,630
Operating an unmanned aircraft and in so doing knowingly or recklessly interfering with a wildfire suppression, law enforcement, or emergency response effort.	49 U.S.C. 46320	24,656	25,455
Violation of 51 U.S.C. 50901–50923, a regulation issued under these statutes, or any term or condition of a license or permit issued or transferred under these statutes.	51 U.S.C. 50917(c)	283,009	292,181

C. National Highway Traffic Safety Administration (NHTSA) 2024 Adjustments

NHTSA's 2024 civil penalty adjustments are summarized in the chart below.

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
Maximum penalty amount for each violation of: 49 U.S.C. 30112, 30115, 30117–30122, 30123(a), 30125(c), 30127, 30141–30147, 30166 or 31137, or a regulation prescribed under any of these sections.	49 U.S.C. 30165(a)(1), 30165(a)(3).	$26,315	$27,168
Maximum penalty amount for a related series of violations of: 49 U.S.C. 30112, 30115, 30117–30122, 30123(a), 30125(c), 30127, 30141- 30147, 30166 or 31137, or a regulation prescribed under any of these sections.	49 U.S.C. 30165(a)(1), 30165(a)(3).	131,564,183	135,828,178
Maximum penalty per school bus related violation of 49 U.S.C. 30112(a)(1) or 30112(a)(2)	49 U.S.C. 30165(a)(2)(A)	14,960	15,445
Maximum penalty amount for a series of school bus related violations of 49 U.S.C. 30112(a)(1) or 30112(a)(2).	49 U.S.C. 30165(a)(2)(B)	22,440,526	23,167,823

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
Maximum penalty per violation for filing false or misleading reports	49 U.S.C. 30165(a)(4)	6,441	6,650
Maximum penalty amount for a series of violations related to filing false or misleading reports	49 U.S.C. 30165(a)(4)	1,288,315	1,330,069
Maximum penalty amount for each violation of the reporting requirements related to maintaining the National Motor Vehicle Title Information System.	49 U.S.C. 30505	2,100	2,168
Maximum penalty amount for each violation of a bumper standard under 49 U.S.C. 32506	49 U.S.C. 32507(a)	3,446	3,558
Maximum penalty amount for a series of violations of a bumper standard under 49 U.S.C. 32506	49 U.S.C. 32507(a)	3,837,393	3,961,763
Maximum penalty amount for each violation of 49 U.S.C. 32308(a) related to providing information on crashworthiness and damage susceptibility.	49 U.S.C. 32308(b)	3,446	3,558
Maximum penalty amount for a series of violations of 49 U.S.C. 32308(a) related to providing information on crashworthiness and damage susceptibility.	49 U.S.C. 32308(b)	1,879,489	1, 940,403
Maximum penalty for each violation related to the tire fuel efficiency information program	49 U.S.C. 32308(c)	71,317	73,628
Maximum civil penalty for willfully failing to affix, or failing to maintain, the label required in 49 U.S.C. 32304.	49 U.S.C. 32309	2,100	2,168
Maximum penalty amount per violation related to odometer tampering and disclosure	49 U.S.C. 32709	12,882	13,300
Maximum penalty amount for a related series of violations related to odometer tampering and disclosure.	49 U.S.C. 32709	1,288,315	1,330,069
Maximum penalty amount per violation related to odometer tampering and disclosure with intent to defraud.	49 U.S.C. 32710	12,882	13,300
Maximum penalty amount for each violation of 49 U.S.C. 33114(a)(1)–(4)	49 U.S.C. 33115(a)	2,830	2,922
Maximum penalty amount for a related series of violations of 49 U.S.C. 33114(a)(1)–(4)	49 U.S.C. 33115(a)	707,524	730,455
Maximum civil penalty for violations of 49 U.S.C. 33114(a)(5)	49 U.S.C. 33115(b)	210,161	216,972
Maximum civil penalty for violations under 49 U.S.C. 32911(a) related to automobile fuel economy.	49 U.S.C 32912(a)	49,534	51,139
Civil penalty factor for violations of fuel economy standards prescribed for a model year under 49 U.S.C. 32902[3].	49 U.S.C. 32912(b)	16	17
Maximum civil penalty factor that may be prescribed for fuel economy standards under 49 U.S.C. 32912(c)(1)(A).	49 U.S.C. 32912(c)(1)(B)	31	32
Maximum civil penalty for a violation under the medium- and heavy-duty vehicle fuel efficiency program.	49 U.S.C. 32902	48,779	50,360

[3] For model years before model year 2019, the civil penalty is $5.50; for model years 2019 through 2021, the civil penalty is $14; for model year 2022, the civil penalty is $15; for model year 2023, the civil penalty is $16; for model year 2024, the civil penalty is $17.

D. Federal Motor Carrier Safety Administration (FMCSA) 2024 Adjustments

FMCSA's civil penalties affected by this rule are all located in appendices A and B to 49 CFR part 386. The 2024 adjustments to these civil penalties are summarized in the chart below. Note that the civil penalties for violations of Appendix A IV (h) and (j) were incorrectly stated in the regulatory text of the 2023 update as $31,536 rather than $28,304 (88 FR 1114, 1130; Jan. 6, 2023), though these penalties were correctly stated in the preamble as updated from $26,269 as $28,304 (*Id.* at 1117). These errors have been corrected in this 2024 update. In addition, the civil penalties for violations of Appendix B (i)(1) and (2) were incorrectly stated in the regulatory text of the 2023 update as $6,247 rather than $6,441 (*Id.* at 1131), though these penalties were correctly stated in the preamble as updated from $5,978 to $6,441 (*Id.* at 1119). These errors have also been corrected in this 2024 update.

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
Appendix A II Subpoena	49 U.S.C. 525	$1,288	$1,330
Appendix A II Subpoena	49 U.S.C. 525	12,882	13,300
Appendix A IV (a) Out-of-service order (operation of commercial motor vehicle (CMV) by driver)	49 U.S.C. 521(b)(7)	2,232	2,304
Appendix A IV (b) Out-of-service order (requiring or permitting operation of CMV by driver)	49 U.S.C. 521(b)(7)	22,324	23,048
Appendix A IV (c) Out-of-service order (operation by driver of CMV or intermodal equipment that was placed out of service).	49 U.S.C. 521(b)(7)	2,232	2,304
Appendix A IV (d) Out-of-service order (requiring or permitting operation of CMV or intermodal equipment that was placed out of service).	49 U.S.C. 521(b)(7)	22,324	23,048
Appendix A IV (e) Out-of-service order (failure to return written certification of correction)	49 U.S.C. 521(b)(2)(B)	1,116	1,152
Appendix A IV (g) Out-of-service order (failure to cease operations as ordered)	49 U.S.C. 521(b)(2)(F)	32,208	33,252
Appendix A IV (h) Out-of-service order (operating in violation of order)	49 U.S.C. 521(b)(7)	28,304	29,221
Appendix A IV (i) Out-of-service order (conducting operations during suspension or revocation for failure to pay penalties).	49 U.S.C. 521(b)(2)(A) and (b)(7).	18,170	18,759
Appendix A IV (j) (conducting operations during suspension or revocation)	49 U.S.C. 521(b)(7)	28,304	29,221
Appendix B (a)(1) Recordkeeping—maximum penalty per day	49 U.S.C. 521(b)(2)(B)(i)	1,496	1,544
Appendix B (a)(1) Recordkeeping—maximum total penalty	49 U.S.C. 521(b)(2)(B)(i)	14,960	15,445
Appendix B (a)(2) Knowing falsification of records	49 U.S.C. 521(b)(2)(B)(ii)	14,960	15,445
Appendix B (a)(3) Non-recordkeeping violations	49 U.S.C. 521(b)(2)(A)	18,170	18,759
Appendix B (a)(4) Non-recordkeeping violations by drivers	49 U.S.C. 521(b)(2)(A)	4,543	4,690
Appendix B (a)(5) Violation of 49 CFR 392.5 (first conviction)	49 U.S.C. 31310(i)(2)(A)	3,740	3,861
Appendix B (a)(5) Violation of 49 CFR 392.5 (second or subsequent conviction)	49 U.S.C. 31310(i)(2)(A)	7,481	7,723
Appendix B (b) Commercial driver's license (CDL) violations	49 U.S.C. 521(b)(2)(C)	6,755	6,974
Appendix B (b)(1): Special penalties pertaining to violation of out-of-service orders (first conviction).	49 U.S.C. 31310(i)(2)(A)	3,740	3,861
Appendix B (b)(1) Special penalties pertaining to violation of out-of-service orders (second or subsequent conviction).	49 U.S.C. 31310(i)(2)(A)	7,481	7,723
Appendix B (b)(2) Employer violations pertaining to knowingly allowing, authorizing employee violations of out-of-service order (minimum penalty).	49 U.S.C. 521(b)(2)(C)	6,755	6,974
Appendix B (b)(2) Employer violations pertaining to knowingly allowing, authorizing employee violations of out-of-service order (maximum penalty).	49 U.S.C. 31310(i)(2)(C)	37,400	38,612

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
Appendix B (b)(3) Special penalties pertaining to railroad-highway grade crossing violations	49 U.S.C. 31310(j)(2)(B)	19,389	20,017
Appendix B (d) Financial responsibility violations	49 U.S.C. 31138(d)(1), 31139(g)(1).	19,933	20,579
Appendix B (e)(1) Violations of Hazardous Materials Regulations (HMRs) and Safety Permitting Regulations (transportation or shipment of hazardous materials).	49 U.S.C. 5123(a)(1)	96,624	99,756
Appendix B (e)(2) Violations of Hazardous Materials Regulations (HMRs) and Safety Permitting Regulations (training)—minimum penalty.	49 U.S.C. 5123(a)(3)	582	601
Appendix B (e)(2): Violations of Hazardous Materials Regulations (HMRs) and Safety Permitting Regulations (training)—maximum penalty.	49 U.S.C. 5123(a)(1)	96,624	99,756
Appendix B (e)(3) Violations of Hazardous Materials Regulations (HMRs) and Safety Permitting Regulations (packaging or container).	49 U.S.C. 5123(a)(1)	96,624	99,756
Appendix B (e)(4): Violations of Hazardous Materials Regulations (HMRs) and Safety Permitting Regulations (compliance with FMCSRs).	49 U.S.C. 5123(a)(1)	96,624	99,756
Appendix B (e)(5) Violations of Hazardous Materials Regulations (HMRs) and Safety Permitting Regulations (death, serious illness, severe injury to persons; destruction of property).	49 U.S.C. 5123(a)(2)	225,455	232,762
Appendix B (f)(1) Operating after being declared unfit by assignment of a final ''unsatisfactory'' safety rating (generally).	49 U.S.C. 521(b)(2)(F)	32,208	33,252
Appendix B (f)(2) Operating after being declared unfit by assignment of a final ''unsatisfactory'' safety rating (hazardous materials)—maximum penalty.	49 U.S.C. 5123(a)(1)	96,624	99,756
Appendix B (f)(2): Operating after being declared unfit by assignment of a final ''unsatisfactory'' safety rating (hazardous materials)—maximum penalty if death, serious illness, severe injury to persons; destruction of property.	49 U.S.C. 5123(a)(2)	225,455	232,762
Appendix B (g)(1): Violations of the commercial regulations (CRs) (property carriers)	49 U.S.C. 14901(a)	12,882	13,300
Appendix B (g)(2) Violations of the CRs (brokers)	49 U.S.C. 14916(c)	12,882	13,300
Appendix B (g)(3) Violations of the CRs (passenger carriers)	49 U.S.C. 14901(a)	32,208	33,252
Appendix B (g)(4) Violations of the CRs (foreign motor carriers, foreign motor private carriers)	49 U.S.C. 14901(a)	12,882	13,300
Appendix B (g)(5) Violations of the operating authority requirement (foreign motor carriers, foreign motor private carriers)—maximum penalty for intentional violation.	49 U.S.C. 14901 note	17,717	18,291
Appendix B (g)(5) Violations of the operating authority requirement (foreign motor carriers, foreign motor private carriers)—maximum penalty for a pattern of intentional violations.	49 U.S.C. 14901 note	44,294	45,730
Appendix B (g)(6) Violations of the CRs (motor carrier or broker for transportation of hazardous wastes)—minimum penalty.	49 U.S.C. 14901(b)	25,767	26,602
Appendix B (g)(6) Violations of the CRs (motor carrier or broker for transportation of hazardous wastes)—maximum penalty.	49 U.S.C. 14901(b)	51,533	53,203
Appendix B (g)(7): Violations of the CRs (household goods (HHG) carrier or freight forwarder, or their receiver or trustee).	l49 U.S.C. 14901(d)(1)	1,937	2,000
Appendix B (g)(8) Violation of the CRs (weight of HHG shipment, charging for services)—minimum penalty for first violation.	49 U.S.C. 14901(e)	3,879	4,005
Appendix B (g)(8) Violation of the CRs (weight of HHG shipment, charging for services)—minimum penalty for subsequent violation.	49 U.S.C. 14901(e)	9,695	10,009
Appendix B (g)(10) Tariff violations	49 U.S.C. 13702, 14903	193,890	200,174
Appendix B (g)(11) Additional tariff violations (rebates or concessions)—first violation	49 U.S.C. 14904(a)	387	400
Appendix B (g)(11) Additional tariff violations (rebates or concessions)—subsequent violations	49 U.S.C. 14904(a)	484	500
Appendix B (g)(12): Tariff violations (freight forwarders)—maximum penalty for first violation	49 U.S.C. 14904(b)(1)	971	1,002
Appendix B (g)(12): Tariff violations (freight forwarders)—maximum penalty for subsequent violations.	49 U.S.C. 14904(b)(1)	3,879	4,005
Appendix B (g)(13): service from freight forwarder at less than rate in effect—maximum penalty for first violation.	49 U.S.C. 14904(b)(2)	971	1,002
Appendix B (g)(13): service from freight forwarder at less than rate in effect—maximum penalty for subsequent violation(s).	49 U.S.C. 14904(b)(2)	3,879	4,005
Appendix B (g)(14): Violations related to loading and unloading motor vehicles	49 U.S.C. 14905	19,389	20,017
Appendix B (g)(16): Reporting and recordkeeping under 49 U.S.C. subtitle IV, part B (except 13901 and 13902(c))—minimum penalty.	49 U.S.C. 14901	1,288	1,330
Appendix B (g)(16): Reporting and recordkeeping under 49 U.S.C. subtitle IV, part B—maximum penalty.	49 U.S.C. 14907	9,695	10,009
Appendix B (g)(17): Unauthorized disclosure of information	49 U.S.C. 14908	3,879	4,005
Appendix B (g)(18): Violation of 49 U.S.C. subtitle IV, part B, or condition of registration	49 U.S.C. 14910	971	1,002
Appendix B (g)(21)(i): Knowingly and willfully fails to deliver or unload HHG at destination	49 U.S.C. 14915	19,389	20,017
Appendix B (g)(22): HHG broker estimate before entering into an agreement with a motor carrier	49 U.S.C. 14901(d)(2)	14,960	15,445
Appendix B (g)(23): HHG transportation or broker services—registration requirement	49 U.S.C. 14901 (d)(3)	37,400	38,612
Appendix B (h): Copying of records and access to equipment, lands, and buildings—maximum penalty per day.	49 U.S.C. 521(b)(2)(E)	1,496	1,544
Appendix B (h): Copying of records and access to equipment, lands, and buildings—maximum total penalty.	49 U.S.C. 521(b)(2)(E)	14,960	15,445
Appendix B (i)(1): Evasion of regulations under 49 U.S.C. ch. 5, 51, subchapter III of ch. 311 (except 31138 and 31139), 31302–31304, 31305(b), 31310(g)(1)(A), or 31502—minimum penalty for first violation.	49 U.S.C. 524	2,577	2,661
Appendix B (i)(1): Evasion of regulations under 49 U.S.C. ch. 5, 51, subchapter III of ch. 311 (except 31138 and 31139), 31302–31304, 31305(b), 31310(g)(1)(A), or 31502—maximum penalty for first violation.	49 U.S.C. 524	6,441	6,650
Appendix B (i)(1): Evasion of regulations under 49 U.S.C. ch. 5, 51, subchapter III of ch. 311 (except 31138 and 31139), 31302–31304, 31305(b), 31310(g)(1)(A), or 31502—minimum penalty for subsequent violation(s).	49 U.S.C. 524	3,219	3,323
Appendix B (i)(1): Evasion of regulations under 49 U.S.C. ch. 5, 51, subchapter III of ch. 311 (except 31138 and 31139), 31302–31304, 31305(b), 31310(g)(1)(A), or 31502—maximum penalty for subsequent violation(s).	49 U.S.C. 524	9,652	9,965
Appendix B (i)(2): Evasion of regulations under 49 U.S.C. subtitle IV, part B—minimum penalty for first violation.	49 U.S.C. 14906	2,577	2,661
Appendix B (i)(2): Evasion of regulations under 49 U.S.C. subtitle IV, part B—minimum penalty for subsequent violation(s).	49 U.S.C. 14906	6,441	6,650

E. Federal Railroad Administration (FRA) 2024 Adjustments

FRA's 2024 civil penalty adjustments are summarized in the chart below.

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
Minimum rail safety penalty	49 U.S.C. ch. 213	$1,052	$1,086
Ordinary maximum rail safety penalty	49 U.S.C. ch. 213	34,401	35,516
Maximum penalty for an aggravated rail safety violation	49 U.S.C. ch. 213	137,603	142,063
Minimum penalty for hazardous materials training violations	49 U.S.C. 5123	582	601
Maximum penalty for ordinary hazardous materials violations	49 U.S.C. 5123	96,624	99,756
Maximum penalty for aggravated hazardous materials violations	49 U.S.C. 5123	225,455	232,762

F. Pipeline and Hazardous Materials Safety Administration (PHMSA) 2024 Adjustments

PHMSA's civil penalties affected by this rule for hazardous materials violations are located in 49 CFR 107.329, appendix A to subpart D of 49 CFR part 107, and § 171.1. The civil penalties affected by this rule for pipeline safety violations are located in § 190.223. PHMSA's 2024 civil penalty adjustments are summarized in the chart below.

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
Maximum penalty for hazardous materials violation	49 U.S.C. 5123	$96,624	$99,756
Maximum penalty for hazardous materials violation that results in death, serious illness, or severe injury to any person or substantial destruction of property.	49 U.S.C. 5123	225,455	232,762
Minimum penalty for hazardous materials training violations	49 U.S.C. 5123	582	601
Maximum penalty for each pipeline safety violation	49 U.S.C. 60122(a)(1)	257,664	266,015
Maximum penalty for a related series of pipeline safety violations	49 U.S.C. 60122(a)(1)	2,576,627	2,660,135
Maximum additional penalty for each liquefied natural gas pipeline facility violation.	49 U.S.C. 60122(a)(2)	94,128	97,179
Maximum penalty for discrimination against employees providing pipeline safety information.	49 U.S.C. 60122(a)(3)	1,496	1,544

G. Maritime Administration (MARAD) 2024 Adjustments

MARAD's 2024 civil penalty adjustments are summarized in the chart below. Note that the penalty in the regulatory text at 46 CFR 221.61(b) for violations of 46 U.S.C. 56010(e) was stated in error as $22,750 in the 2023 civil penalties rule update (88 FR 1114, 1124), though it was correctly stated in the preamble of the that rule as $24,905, updated from the 2022 civil penalty of $23,115 (*Id.* at 1120). This error has been corrected in this 2024 update.

Description	Citation	Existing penalty	New penalty (existing penalty × 1.03241)
Maximum civil penalty for a single violation of any provision under 46 U.S.C. Chapter 313 and all of Subtitle III related MARAD regulations, except for violations of 46 U.S.C. 31329.	46 U.S.C. 31309	24,746	25,548
Maximum civil penalty for a single violation of 46 U.S.C. 31329 as it relates to the court sales of documented vessels.	46 U.S.C. 31330	61,982	63,991
Maximum civil penalty for a single violation of 46 U.S.C. 56101 as it relates to approvals required to transfer a vessel to a noncitizen.	46 U.S.C. 56101(e)	24,905	25,712
Maximum civil penalty for failure to file an Automated Mutual Assistance Vessel Rescue System (AMVER) report.	46 U.S.C. 50113(b)	157	162
Maximum civil penalty for violating procedures for the use and allocation of shipping services, port facilities and services for national security and national defense operations.	50 U.S.C. 4513	31,326	32,341
Maximum civil penalty for violations in applying for or renewing a vessel's fishery endorsement.	46 U.S.C. 12151	181,713	187,602

H. Great Lakes St. Lawrence Seaway Development Corporation (GLS) 2024 Adjustments

The 2024 civil penalty adjustment for GLS is as follows:

Description	Citation	Existing penalty	New penalty (existing penalty ×1.03241)
Maximum civil penalty for each violation of the Seaway Rules and Regulations at 33 CFR part 401.	33 U.S.C. 1232	$111,031	$114,630

Regulatory Analysis and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures and is considered not significant under Executive Order 12866 and DOT's Regulatory Policies and Procedures; therefore, the rule has not been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

B. Regulatory Flexibility Analysis

The Department has determined the Regulatory Flexibility Act of 1980 (RFA) (5 U.S.C. 601, *et seq.*) does not apply to this rulemaking. The RFA applies, in pertinent part, only when ''an agency is required . . . to publish general notice of proposed rulemaking.'' 5 U.S.C. 604(a). The Small Business Administration's *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (2012), explains that:

> If, under the [Administrative Procedure Act (APA)] or any rule of general applicability governing federal grants to state and local governments, the agency is required to publish a general notice of proposed rulemaking (NPRM), the RFA must be considered [citing 5 U.S.C. 604(a)]. . . . If an NPRM is not required, the RFA does not apply.

As stated above, DOT has determined that good cause exists to publish this final rule without notice and comment procedures under the APA. Therefore, the analytical requirements of the RFA do not apply.

C. Executive Order 13132 (Federalism)

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This regulation has no substantial direct effects on the States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government. It does not contain any provision that imposes substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Because none of the measures in the rule have tribal implications or impose substantial direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing notice of and a 60-day comment period on, and otherwise consult with members of the public and affected agencies concerning, each proposed collection of information. This final rule imposes no new information reporting or record keeping necessitating clearance by OMB.

F. National Environmental Policy Act

The Department has analyzed the environmental impacts of this final rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979, as amended July 13, 1982, and July 30, 1985). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). *See* 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 4(c)(5) of DOT Order 5610.1C includes the categorical exclusions for all DOT Operating Administrations. This action qualifies for a categorical exclusion in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures (80 FR 44208, July 24, 2015), paragraph 5–6.6.f, which covers regulations not expected to cause any potentially significant environmental impacts. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this final rule.

G. Unfunded Mandates Reform Act

The Department analyzed the final rule under the factors in the Unfunded Mandates Reform Act of 1995. The Department considered whether the rule includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year. The Department has determined that this final rule will not result in such expenditures. Accordingly, no further assessment or analysis is required under the Unfunded Mandates Reform Act.

List of Subjects

14 CFR Part 13

Administrative practice and procedure, Air transportation, Hazardous materials transportation, Investigations, Law enforcement, Penalties.

14 CFR Part 383

Administrative practice and procedure, Penalties.

14 CFR Part 406

Administrative procedure and review, Commercial space transportation, Enforcement, Investigations, Penalties, Rules of adjudication.

33 CFR Part 401

Hazardous materials transportation, Navigation (water), Penalties, Radio, Reporting and recordkeeping requirements, Vessels, Waterways.

46 CFR Part 221

Administrative practice and procedure, Maritime carriers, Mortgages, Penalties, Reporting and recordkeeping requirements, Trusts and trustees.

46 CFR Part 307

Marine safety, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

46 CFR Part 340

Harbors, Maritime carriers, National defense, Packaging and containers.

46 CFR Part 356

Citizenship and naturalization, Fishing vessels, Mortgages, Penalties, Reporting and recordkeeping requirements, Vessels.

49 CFR Part 107

Administrative practices and procedure, Hazardous materials transportation, Packaging and containers, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 171

Administrative practice and procedure, Exports, Hazardous materials transportation, Hazardous waste, Imports, Information, Reporting and recordkeeping requirements.

49 CFR Part 190

Administrative practice and procedure, Penalties, Pipeline safety.

49 CFR Part 209

Administrative practice and procedure, Hazardous materials transportation, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 213

Bridges, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 214

Bridges, Occupational safety and health, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 215

Freight, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Parts 216, 217, 221, 224, 229, 230, 232, 233, and 239

Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 218

Occupational safety and health, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 220

Penalties, Radio, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Parts 222, 235, 240, 242, 243, and 244

Administrative practice and procedure, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 223

Glazing standards, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 225

Investigations, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 227

Noise control, Occupational safety and health, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 228

Penalties, Railroad employees, Reporting and recordkeeping requirements.

49 CFR Part 231

Penalties, Railroad safety.

49 CFR Part 234

Highway safety, Penalties, Railroad safety, Reporting and recordkeeping requirements, State and local governments.

49 CFR Part 236

Penalties, Positive train control, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 237

Bridges, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 238

Fire prevention, Passenger equipment, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 241

Communications, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 272

Penalties, Railroad employees, Railroad safety, Railroads, Safety, Transportation.

49 CFR Part 386

Administrative procedures, Commercial motor vehicle safety, Highways and roads, Motor carriers, Penalties.

49 CFR Part 578

Imports, Motor vehicle safety, Motor vehicles, Penalties, Rubber and rubber products, Tires.

Accordingly, the Department of Transportation amends 14 CFR chapters I, II, and III, 33 CFR chapter IV, 46 CFR chapter II, and 49 CFR chapters I, II, III, and V as follows:

Title 14—Aeronautics and Space

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

■ 1. The authority citation for part 13 continues to read as follows:

Authority: 18 U.S.C. 6002; 28 U.S.C. 2461 (note); 49 U.S.C. 106(g), 5121–5124, 40113–40114, 44103–44106, 44701–44704, 44709–44710, 44713, 44725, 44742, 44802 (note), 46101–46111, 46301, 46302 (for a violation of 49 U.S.C. 46504), 46304–46316, 46318–46320, 46501–46502, 46504, 46507, 47106, 47107, 47111, 47122, 47306, 47531–47532; 49 CFR 1.83.

■ 2. Amend § 13.301 by revising paragraphs (b) and (c) to read as follows:

§ 13.301 Inflation adjustments of civil monetary penalties.

* * * * *

(b) Each adjustment to a maximum civil monetary penalty or to minimum and maximum civil monetary penalties that establish a civil monetary penalty range applies to actions initiated under this part for violations occurring on or after December 28, 2023, notwithstanding references to specific civil penalty amounts elsewhere in this part.

(c) Minimum and maximum civil monetary penalties are as follows:

TABLE 1 TO § 13.301(c)—MINIMUM AND MAXIMUM CIVIL MONETARY PENALTY AMOUNTS FOR CERTAIN VIOLATIONS

United States Code citation	Civil monetary penalty description	2023 minimum penalty amount	New adjusted minimum penalty amount for violations occurring on or after December 28, 2023	2023 maximum penalty amount	New adjusted maximum penalty amount for violations occurring on or after December 28, 2023
49 U.S.C. 5123(a)(1)	Violation of hazardous materials transportation law	N/A	N/A	$96,624	$99,756.
49 U.S.C. 5123(a)(2)	Violation of hazardous materials transportation law resulting in death, serious illness, severe injury, or substantial property destruction.	N/A	N/A	$225,455	$232,762.
49 U.S.C. 5123(a)(3)	Violation of hazardous materials transportation law relating to training.	$582	$601	$96,624	$99,756.
49 U.S.C. 44704(d)(3)	Knowing presentation of a nonconforming aircraft for issuance of an initial airworthiness certificate by a production certificate holder.	N/A	N/A	$1,144,488	$1,181,581.
49 U.S.C. 44704(e)(4)	Knowing failure by an applicant for or holder of a type certificate to submit safety critical information or include certain such information in an airplane flight manual or flight crew operating manual.	N/A	N/A	$1,144,488	$1,181,581.
49 U.S.C. 44704(e)(5)	Knowing false statement by an airline transport pilot (ATP) certificate holder with respect to the submission of certain safety critical information.	N/A	N/A	See entries for 49 U.S.C. 46301(a)(1) and (a)(5).	See entries for 49 U.S.C. 46301(a)(1) and (a)(5).
49 U.S.C. 44742	Interference by a supervisory employee of an organization designation authorization (ODA) holder that manufactures a transport category airplane with an ODA unit member's performance of authorized functions.	N/A	N/A	See entries for 49 U.S.C. 46301(a)(1).	See entries for 49 U.S.C. 46301(a)(1).
49 U.S.C. 44802 note	Operation of an unmanned aircraft or unmanned aircraft system equipped or armed with a dangerous weapon.	N/A	N/A	$29,462	$30,417.
49 U.S.C. 46301(a)(1)	Violation by a person other than an individual or small business concern under 49 U.S.C. 46301(a)(1)(A) or (B).	N/A	N/A	$40,272	$41,577.
49 U.S.C. 46301(a)(1)	Violation by an airman serving as an airman under 49 U.S.C. 46301(a)(1)(A) or (B) (but not covered by 46301(a)(5)(A) or (B)).	N/A	N/A	$1,771	$1,828.
49 U.S.C. 46301(a)(1)	Violation by an individual or small business concern under 49 U.S.C. 46301(a)(1)(A) or (B) (but not covered in 49 U.S.C. 46301(a)(5)).	N/A	N/A	$1,771	$1,828.
49 U.S.C. 46301(a)(3)	Violation of 49 U.S.C. 47107(b) (or any assurance made under such section) or 49 U.S.C. 47133.	N/A	N/A	Increase above otherwise applicable maximum amount not to exceed 3 times the amount of revenues used in violation of such section.	No change.
49 U.S.C. 46301(a)(5)(A)	Violation by an individual or small business concern (except an airman serving as an airman) under 49 U.S.C. 46301(a)(5)(A)(i) or (ii).	N/A	N/A	$16,108	$16,630.
49 U.S.C. 46301(a)(5)(B)(i).	Violation by an individual or small business concern related to the transportation of hazardous materials.	N/A	N/A	$16,108	$16,630.
49 U.S.C. 46301(a)(5)(B)(ii).	Violation by an individual or small business concern related to the registration or recordation under 49 U.S.C. chapter 441, of an aircraft not used to provide air transportation.	N/A	N/A	$16,108	$16,630.
49 U.S.C. 46301(a)(5)(B)(iii).	Violation by an individual or small business concern of 49 U.S.C. 44718(d), relating to limitation on construction or establishment of landfills.	N/A	N/A	$16,108	$16,630.
49 U.S.C. 46301(a)(5)(B)(iv).	Violation by an individual or small business concern of 49 U.S.C. 44725, relating to the safe disposal of life-limited aircraft parts.	N/A	N/A	$16,108	$16,630.
49 U.S.C. 46301 note	Individual who aims the beam of a laser pointer at an aircraft in the airspace jurisdiction of the United States, or at the flight path of such an aircraft.	N/A	N/A	$30,820	$31,819.
49 U.S.C. 46301(b)	Tampering with a smoke alarm device	N/A	N/A	$5,171	$5,339.
49 U.S.C. 46302	Knowingly providing false information about alleged violation involving the special aircraft jurisdiction of the United States.	N/A	N/A	$28,085	$28,995.
49 U.S.C. 46318	Physical or sexual assault or threat to physically or sexually assault crewmember or other individual on an aircraft, or action that poses an imminent threat to the safety of the aircraft or individuals on board.	N/A	N/A	$42,287	$43,658.
49 U.S.C. 46319	Permanent closure of an airport without providing sufficient notice.	N/A	N/A	$16,108	$16,630.

TABLE 1 TO § 13.301(c)—MINIMUM AND MAXIMUM CIVIL MONETARY PENALTY AMOUNTS FOR CERTAIN VIOLATIONS—Continued

United States Code citation	Civil monetary penalty description	2023 minimum penalty amount	New adjusted minimum penalty amount for violations occurring on or after December 28, 2023	2023 maximum penalty amount	New adjusted maximum penalty amount for violations occurring on or after December 28, 2023
49 U.S.C. 46320	Operating an unmanned aircra ft and in so doing knowingly or recklessly interfering with a wildfire suppression, law enforcement, or emergency response effort.	N/A	N/A	$24,656	$25,455.
49 U.S.C. 47531	Violation of 49 U.S.C. 47528–47530 or 47534, relating to the prohibition of operating certain aircraft not complying with stage 3 noise levels.	N/A	N/A	See entries for 49 U.S.C. 46301(a)(1) and (a)(5).	See entries for 49 U.S.C. 46301(a)(1) and (a)(5).

PART 383—CIVIL PENALTIES

■ 3. The authority citation for part 383 continues to read as follows:

Authority: Sec. 701, Pub. L. 114–74, 129 Stat. 584; Sec. 503, Pub. L. 108–176, 117 Stat. 2490; Pub. L. 101–410, 104 Stat. 890; Sec. 31001, Pub. L. 104–134.

■ 4. Section 383.2 is revised to read as follows:

§ 383.2 Amount of penalty.

Civil penalties payable to the U.S. Government for violations of Title 49, Chapters 401 through 421, pursuant to 49 U.S.C. 46301(a), are as follows:

(a) A general civil penalty of not more than $41,577 (or $1,828 for individuals or small businesses) applies to violations of statutory provisions and rules or orders issued under those provisions, other than those listed in paragraph (b) of this section (*see* 49 U.S.C. 46301(a)(1)); and

(b) With respect to small businesses and individuals, notwithstanding the general civil penalty specified in paragraph (a) of this section, the following civil penalty limits apply:

(1) A maximum civil penalty of $16,630 applies for violations of most provisions of Chapter 401, including the anti-discrimination provisions of sections 40127 (general provision), and 41705 (discrimination against the disabled) and rules and orders issued pursuant to those provisions (*see* 49 U.S.C. 46301(a)(5)(A));

(2) A maximum civil penalty of $8,315 applies for violations of section 41719 and rules and orders issued pursuant to that provision (*see* 49 U.S.C. 46301(a)(5)(C)); and

(3) A maximum civil penalty of $4,159 applies for violations of section 41712 or consumer protection rules or orders (*see* 49 U.S.C. 46301(a)(5)(D)).

PART 406—INVESTIGATIONS, ENFORCEMENT, AND ADMINISTRATIVE REVIEW

■ 5. The authority citation for part 406 continues to read as follows:

Authority: 51 U.S.C. 50901–50923.

■ 6. Amend § 406.9 by revising paragraph (a) to read as follows:

§ 406.9 Civil penalties.

(a) *Civil penalty liability.* Under 51 U.S.C. 50917(c), a person found by the Federal Aviation Administration (FAA) to have violated a requirement of the Act, a regulation issued under the Act, or any term or condition of a license or permit issued or transferred under the Act, is liable to the United States for a civil penalty of not more than $292,181 for each violation. A separate violation occurs for each day the violation continues.

* * * * *

Title 33—Navigation and Navigable Waters

PART 401—SEAWAY REGULATIONS AND RULES

Subpart B—Penalties—Violations of Seaway Regulations

■ 7. The authority citation for subpart B of part 401 continues to read as follows:

Authority: 33 U.S.C. 981–990; 46 U.S.C. 70001–70004, 70011, and 70032; 49 CFR 1.101, unless otherwise noted.

■ 8. Amend § 401.102 by revising paragraph (a) to read as follows:

§ 401.102 Civil penalty.

(a) A person, as described in § 401.101(b) who violates a regulation in this chapter is liable to a civil penalty of not more than $114,630.

* * * * *

Title 46—Shipping

PART 221—REGULATED TRANSACTIONS INVOLVING DOCUMENTED VESSELS AND OTHER MARITIME INTERESTS

■ 9. The authority citation for part 221 continues to read as follows:

Authority: 46 U.S.C. chs. 301, 313, and 561; Pub. L. 114–74; 49 CFR 1.93.

■ 10. Amend § 221.61 by revising paragraph (b) to read as follows:

§ 221.61 Compliance.

* * * * *

(b) Pursuant to 46 U.S.C. 31309, a general penalty of not more than $25,548 may be assessed for each violation of chapter 313 or 46 U.S.C. subtitle III administered by the Maritime Administration, and pursuant to the regulations in this part a person violating 46 U.S.C. 31329 is liable for a civil penalty of not more than $63,991 for each violation. A person who charters, sells, transfers, or mortgages a vessel, or an interest therein, in violation of 46 U.S.C. 56101(e) is liable for a civil penalty of not more than $25,712 for each violation.

PART 307—ESTABLISHMENT OF MANDATORY POSITION REPORTING SYSTEM FOR VESSELS

■ 11. The authority citation for part 307 continues to read as follows:

Authority: Pub. L. 109–304; 46 U.S.C. 50113; Pub. L. 114–74; 49 CFR 1.93.

■ 12. Section 307.19 is revised to read as follows:

§ 307.19 Penalties.

The owner or operator of a vessel in the waterborne foreign commerce of the United States is subject to a penalty of $162 for each day of failure to file an AMVER report required by this part. Such penalty shall constitute a lien upon the vessel, and such vessel may be

libeled in the district court of the United States in which the vessel may be found.

PART 340—PRIORITY USE AND ALLOCATION OF SHIPPING SERVICES, CONTAINERS AND CHASSIS, AND PORT FACILITIES AND SERVICES FOR NATIONAL SECURITY AND NATIONAL DEFENSE RELATED OPERATIONS

■ 13. The authority citation for part 340 continues to read as follows:

Authority: 50 U.S.C. 4501 *et seq.* (''The Defense Production Act''); Executive Order 13603 (77 FR 16651); Executive Order 12656 (53 FR 47491); Pub. L. 114–74; 49 CFR 1.45; 49 CFR 1.93(l).

■ 14. Section 340.9 is revised to read as follows:

§ 340.9 Compliance.

Pursuant to 50 U.S.C. 4513, any person who willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of this part shall, upon conviction, be fined not more than $32,341 or imprisoned for not more than one year, or both.

PART 356—REQUIREMENTS FOR VESSELS OF 100 FEET OR GREATER IN REGISTERED LENGTH TO OBTAIN A FISHERY ENDORSEMENT TO THE VESSEL'S DOCUMENTATION

■ 15. The authority citation for part 356 continues to read as follows:

Authority: 46 U.S.C. 12102; 46 U.S.C. 12151; 46 U.S.C. 31322; Pub. L. 105–277, division C, title II, subtitle I, section 203 (46 U.S.C. 12102 note), section 210(e), and section 213(g), 112 Stat. 2681; Pub. L. 107–20, section 2202, 115 Stat. 168–170; Pub. L. 114–74; 49 CFR 1.93.

■ 16. Amend § 356.49 by revising paragraph (b) to read as follows:

§ 356.49 Penalties.

* * * * *

(b) A fine of up to $187,602 may be assessed against the vessel owner for each day in which such vessel has engaged in fishing (as such term is defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)) within the exclusive economic zone of the United States; and

* * * * *

Title 49—Transportation

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

■ 17. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 Section 4; Pub. L. 104–121 Sections 212–213; Pub. L. 104–134 Section 31001; Pub. L. 114–74 Section 4 (28 U.S.C. note); 49 CFR 1.81 and 1.97; 33 U.S.C. 1321.

■ 18. Revise § 107.329 to read as follows:

§ 107.329 Maximum penalties.

(a) A person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or a special permit or approval issued under this subchapter applicable to the transportation of hazardous materials or the causing of them to be transported or shipped is liable for a civil penalty of not more than $99,756 for each violation, except the maximum civil penalty is $232,762 if the violation results in death, serious illness, or severe injury to any person or substantial destruction of property. There is no minimum civil penalty, except for a minimum civil penalty of $601 for violations relating to training. When the violation is a continuing one, each day of the violation constitutes a separate offense.

(b) A person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or a special permit or approval issued under this subchapter applicable to the design, manufacture, fabrication, inspection, marking, maintenance, reconditioning, repair or testing of a package, container, or packaging component which is represented, marked, certified, or sold by that person as qualified for use in the transportation of hazardous materials in commerce is liable for a civil penalty of not more than $99,756 for each violation, except the maximum civil penalty is $232,762 if the violation results in death, serious illness, or severe injury to any person or substantial destruction of property. There is no minimum civil penalty, except for a minimum civil penalty of $601 for violations relating to training.

Appendix A to Subpart D of Part 107 [Amended]

■ 19. Amend appendix A to subpart D of part 107, under section B, Penalty Increases for Multiple Counts, in the second paragraph, by removing ''$96,624 or $225,455'' and ''January 6, 2023'' and adding in their places ''$99,756 or $232,762'' and ''December 28, 2023,'' respectively.

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

■ 20. The authority citation for part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 section 4; Pub. L. 104–134, section 31001; Pub. L. 114–74 section 4 (28 U.S.C. 2461 note); 49 CFR 1.81 and 1.97.

■ 21. Amend § 171.1 by revising paragraph (g) to read as follows:

§ 171.1 Applicability of Hazardous Materials Regulations (HMR) to persons and functions.

* * * * *

(g) *Penalties for noncompliance.* Each person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued under Federal hazardous material transportation law, subchapter A of this chapter, or a special permit or approval issued under subchapter A or C of this chapter is liable for a civil penalty of not more than $99,756 for each violation, except the maximum civil penalty is $232,762 if the violation results in death, serious illness, or severe injury to any person or substantial destruction of property. There is no minimum civil penalty, except for a minimum civil penalty of $601 for a violation relating to training.

PART 190—PIPELINE SAFETY ENFORCEMENT AND REGULATORY PROCEDURES

■ 22. The authority citation for part 190 continues to read as follows:

Authority: 33 U.S.C. 1321(b); 49 U.S.C. 60101 *et seq.*

■ 23. Amend § 190.223 by revising paragraphs (a), (c), and (d) to read as follows:

§ 190.223 Maximum penalties.

(a) Any person found to have violated a provision of 49 U.S.C. 60101, *et seq.,* or any regulation in 49 CFR parts 190 through 199, or order issued pursuant to 49 U.S.C. 60101, *et seq.* or 49 CFR part 190, is subject to an administrative civil penalty not to exceed $266,015 for each violation for each day the violation continues, with a maximum administrative civil penalty not to exceed $2,660,135 for any related series of violations.

* * * * *

(c) Any person found to have violated any standard or order under 49 U.S.C. 60103 is subject to an administrative civil penalty not to exceed $97,179, which may be in addition to other penalties to which such person may be subject under paragraph (a) of this section.

(d) Any person who is determined to have violated any standard or order under 49 U.S.C. 60129 is subject to an administrative civil penalty not to exceed $1,544, which may be in addition to other penalties to which such person may be subject under paragraph (a) of this section.

* * * * *

PART 209—RAILROAD SAFETY ENFORCEMENT PROCEDURES

■ 24. The authority citation for part 209 continues to read as follows:

Authority: 49 U.S.C. 5123, 5124, 20103, 20107, 20111, 20112, 20114; 28 U.S.C. 2461 note; and 49 CFR 1.89.

■ 25. Amend § 209.103 by revising paragraphs (a) and (c) to read as follows:

§ 209.103 Minimum and maximum penalties.

(a) A person who knowingly violates a requirement of the Federal hazardous materials transportation laws, an order issued thereunder, 49 CFR subchapter A or C of chapter I, subtitle B, or a special permit or approval issued under subchapter A or C of chapter I, subtitle B, of this title is liable for a civil penalty of not more than $99,756 for each violation, except that—

(1) The maximum civil penalty for a violation is $232,762 if the violation results in death, serious illness, or severe injury to any person, or substantial destruction of property; and

(2) A minimum $601 civil penalty applies to a violation related to training.

* * * * *

(c) The maximum and minimum civil penalties described in paragraph (a) of this section apply to violations occurring on or after December 28, 2023.

■ 26. Amend § 209.105 by revising the last sentence of paragraph (c) to read as follows:

§ 209.105 Notice of probable violation.

* * * * *

(c) * * * In an amended notice, FRA may change the civil penalty amount proposed to be assessed up to and including the maximum penalty amount of $99,756 for each violation, except that if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property, FRA may change the penalty amount proposed to be assessed up to and including the maximum penalty amount of $232,762.

§ 209.409 [Amended]

■ 27. Amend § 209.409 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

■ 28. Amend appendix A to part 209 in the section ''Penalty Schedules; Assessment of Maximum Penalties'' as follows:

■ a. Add a sentence at the end of the sixth paragraph;

■ b. Revise the fourth sentence in the seventh paragraph; and

■ c. Revise the first sentence of the tenth paragraph.

The addition and revisions read as follows:

Appendix A to Part 209—Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws

* * * * *

Penalty Schedules; Assessment of Maximum Penalties

* * * * *

* * * Effective December 28, 2023, the minimum civil monetary penalty was raised from $1,052 to $1,086, the ordinary maximum civil monetary penalty was raised from $34,401 to $35,516, and the aggravated maximum civil monetary penalty was raised from $137,603 to $142,063.

* * * For each regulation in this part or order, the schedule shows two amounts within the $1,086 to $35,516 range in separate columns, the first for ordinary violations, the second for willful violations (whether committed by railroads or individuals). * * *

* * * * *

Accordingly, under each of the schedules (ordinarily in a footnote), and regardless of the fact that a lesser amount might be shown in both columns of the schedule, FRA reserves the right to assess the statutory maximum penalty of up to $142,063 per violation where a pattern of repeated violations or a grossly negligent violation has created an imminent hazard of death or injury or has caused death or injury. * * *

* * * * *

Appendix B to Part 209 [Amended]

■ 29. Amend appendix B to part 209 as follows:

■ a. Remove the dollar amount ''$96,624'' everywhere it appears and add in its place ''$99,756'';

■ b. Remove the dollar amount ''$225,455'' everywhere it appears and add in its place ''$232,762''; and

■ c. Remove the dollar amount ''$582'' and add in its place ''$601'' in the first paragraph.

PART 213—TRACK SAFETY STANDARDS

■ 30. The authority citation for part 213 continues to read as follows:

Authority: 49 U.S.C. 20102–20114 and 20142; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 213.15 [Amended]

■ 31. Amend § 213.15 in paragraph (a) as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 214—RAILROAD WORKPLACE SAFETY

■ 32. The authority citation for part 214 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 21301–21302, 31304; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 214.5 [Amended]

■ 33. Amend § 214.5 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 215—RAILROAD FREIGHT CAR SAFETY STANDARDS

■ 34. The authority citation for part 215 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 215.7 [Amended]

■ 35. Amend § 215.7 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 216—SPECIAL NOTICE AND EMERGENCY ORDER PROCEDURES: RAILROAD TRACK, LOCOMOTIVE AND EQUIPMENT

■ 36. The authority citation for part 216 continues to read as follows:

Authority: 49 U.S.C. 20102–20104, 20107, 20111, 20133, 20701–20702, 21301–21302, 21304; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 216.7 [Amended]

■ 37. Amend § 216.7 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 217—RAILROAD OPERATING RULES

■ 37. The authority citation for part 217 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 217.5 [Amended]

■ 38. Amend § 217.5 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 218—RAILROAD OPERATING PRACTICES

■ 39. The authority citation for part 218 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20131, 20138, 20144, 20168; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 218.9 [Amended]

■ 40. Amend § 218.9 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 219—CONTROL OF ALCOHOL AND DRUG USE

■ 41. The authority citation for part 219 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461 note; Div. A, Sec. 412, Pub. L. 110–432, 122 Stat. 4889 (49 U.S.C. 20140 note); Sec. 8102, Pub. L. 115–271, 132 Stat. 3894; and 49 CFR 1.89.

§ 219.10 [Amended]

■ 42. Amend § 219.10 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 220—RAILROAD COMMUNICATIONS

■ 43. The authority citation for part 220 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20103, note, 20107, 21301–21302, 20701–20703, 21304, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 220.7 [Amended]

■ 44. Amend § 220.7 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 221—REAR END MARKING DEVICE—PASSENGER, COMMUTER AND FREIGHT TRAINS

■ 45. The authority citation for part 221 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 221.7 [Amended]

■ 46. Amend § 221.7 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 222—USE OF LOCOMOTIVE HORNS AT PUBLIC HIGHWAY-RAIL GRADE CROSSINGS

■ 47. The authority citation for part 222 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20153, 21301, 21304; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 222.11 [Amended]

■ 48. Amend § 222.11 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 223—SAFETY GLAZING STANDARDS—LOCOMOTIVES, PASSENGER CARS AND CABOOSES

■ 49. The authority citation for part 223 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20133, 20701–20702, 21301–21302, 21304; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 223.7 [Amended]

■ 50. Amend § 223.7 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 224—REFLECTORIZATION OF RAIL FREIGHT ROLLING STOCK

■ 51. The authority citation for part 224 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20148 and 21301; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 224.11 [Amended]

■ 52. Amend § 224.11 in paragraph (a) as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 225—RAILROAD ACCIDENTS/INCIDENTS: REPORTS CLASSIFICATION, AND INVESTIGATIONS

■ 53. The authority citation for part 225 is continues to read as follows:

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901–20902, 21301, 21302, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 225.29 [Amended]

■ 54. Amend § 225.29 as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and

■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 227—OCCUPATIONAL NOISE EXPOSURE

■ 55. The authority citation for part 227 continues to read as follows:

Authority: 49 U.S.C. 20103, 20103, note, 20701–20702; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 227.9 [Amended]

■ 56. Amend § 227.9 in paragraph (a) as follows:

■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';

■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 228—PASSENGER TRAIN EMPLOYEE HOURS OF SERVICE; RECORDKEEPING AND REPORTING; SLEEPING QUARTERS

■ 57. The authority citation for part 228 continues to read as follows:

Authority: 49 U.S.C. 103, 20103, 20107, 21101–21109; 49 U.S.C. 21301, 21303, 21304, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 228.6 [Amended]

■ 58. Amend § 228.6 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

■ 59. Amend appendix A to part 228, under the heading ''General Provisions,'' in the ''Penalty'' paragraph by adding a sentence at the end of the first paragraph to read as follows:

Appendix A to Part 228—Requirements of the Hours of Service Act: Statement of Agency Policy and Interpretation

* * * * *

General Provisions

* * * * *

Penalty. * * * Effective December 28, 2023, the minimum civil monetary penalty was raised from $1,052 to $1,086, the ordinary maximum civil monetary penalty was raised from $34,401 to $35,516, and the aggravated maximum civil monetary penalty was raised from $137,603 to $142,063.

* * * * *

PART 229—RAILROAD LOCOMOTIVE SAFETY STANDARDS

■ 60. The authority citation for part 229 continues to read as follows:

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901–02, 21301, 21302, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 229.7 [Amended]

■ 61. Amend § 229.7 in paragraph (b) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 230—STEAM LOCOMOTIVE INSPECTION AND MAINTENANCE STANDARDS

■ 62. The authority citation for part 230 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20702; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 230.4 [Amended]

■ 63. Amend § 230.4 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 231—RAILROAD SAFETY APPLIANCE STANDARDS

■ 64. The authority citation for part 231 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20131, 20301–20303, 21301–21302, 21304; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 231.0 [Amended]

■ 65. Amend § 231.0 in paragraph (f) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 233—SIGNAL SYSTEMS REPORTING REQUIREMENTS

■ 66. The authority citation for part 233 continues to read as follows:

Authority: 49 U.S.C. 504, 522, 20103, 20107, 20501–20505, 21301, 21302, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 233.11 [Amended]

■ 67. Amend § 233.11 as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 234—GRADE CROSSING SAFETY

■ 68. The authority citation for part 234 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20152, 20160, 21301, 21304, 21311, 22907 note; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 234.6 [Amended]

■ 69. Amend § 234.6 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 235—INSTRUCTIONS GOVERNING APPLICATIONS FOR APPROVAL OF A DISCONTINUANCE OR MATERIAL MODIFICATION OF A SIGNAL SYSTEM OR RELIEF FROM THE REQUIREMENTS OF PART 236

■ 70. The authority citation for part 235 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 235.9 [Amended]

■ 71. Amend § 235.9 as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 236—RULES, STANDARDS, AND INSTRUCTIONS GOVERNING THE INSTALLATION, INSPECTION, MAINTENANCE, AND REPAIR OF SIGNAL AND TRAIN CONTROL SYSTEMS, DEVICES, AND APPLIANCES

■ 72. The authority citation for part 236 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20157, 20301–20303, 20306, 20501–20505, 20701–20703, 21301–21302, 21304; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 236.0 [Amended]

■ 73. Amend § 236.0 in paragraph (f) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 237—BRIDGE SAFETY STANDARDS

■ 74. The authority citation for part 237 continues to read as follows:

Authority: 49 U.S.C. 20102–20114; 28 U.S.C. 2461 note; Div. A, Sec. 417, Pub. L. 110–432, 122 Stat. 4848; and 49 CFR 1.89.

§ 237.7 [Amended]

■ 75. Amend § 237.7 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 238—PASSENGER EQUIPMENT SAFETY STANDARDS

■ 76. The authority citation for part 238 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20133, 20141, 20302–20303, 20306, 20701–20702, 21301–21302, 21304; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 238.11 [Amended]

■ 77. Amend § 238.11 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 239—PASSENGER TRAIN EMERGENCY PREPAREDNESS

■ 78. The authority citation for part 239 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20105–20114, 20133, 21301, 21304, and 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 239.11 [Amended]

■ 79. Amend § 239.11 as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 240—QUALIFICATION AND CERTIFICATION OF LOCOMOTIVE ENGINEERS

■ 80. The authority citation for part 240 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20135, 21301, 21304, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 240.11 [Amended]

■ 81. Amend § 240.11 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063.

PART 241—UNITED STATES LOCATIONAL REQUIREMENT FOR DISPATCHING OF UNITED STATES RAIL OPERATIONS

■ 82. The authority citation for part 241 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 21301, 21304, 21311; 28 U.S.C. 2461 note; 49 CFR 1.89.

§ 241.15 [Amended]

■ 83. Amend § 241.15 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 242—QUALIFICATION AND CERTIFICATION OF CONDUCTORS

■ 84. The authority citation for part 242 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20135, 20138, 20162, 20163, 21301, 21304, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 242.11 [Amended]

■ 85. Amend § 242.11 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 243—TRAINING, QUALIFICATION, AND OVERSIGHT FOR SAFETY-RELATED RAILROAD EMPLOYEES

■ 86. The authority citation for part 243 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20131–20155, 20162, 20301–20306, 20701–20702, 21301–21304, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 243.7 [Amended]

■ 87. Amend § 243.7 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 244—REGULATIONS ON SAFETY INTEGRATION PLANS GOVERNING RAILROAD CONSOLIDATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

■ 88. The authority citation for part 244 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 21301; 5 U.S.C. 553 and 559; 28 U.S.C. 2461 note; and 49 CFR 1.89.

§ 244.5 [Amended]

■ 89. Amend § 244.5 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 272—CRITICAL INCIDENT STRESS PLANS

■ 90. The authority citation for part 272 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20109 note; 28 U.S.C. 2461 note; and 4 CFR 1.89.

§ 272.11 [Amended]

■ 91. Amend § 272.11 in paragraph (a) as follows:
■ a. Remove the dollar amount ''$1,052'' and add in its place ''$1,086'';
■ b. Remove the dollar amount ''$34,401'' and add in its place ''$35,516''; and
■ c. Remove the dollar amount ''$137,603'' and add in its place ''$142,063''.

PART 386—RULES OF PRACTICE FOR FMCSA PROCEEDINGS

■ 92. The authority citation for part 386 continues to read as follows:

Authority: 28 U.S.C. 2461 note; 49 U.S.C. 113, 1301 note, 31306a; 49 U.S.C. chapters 5, 51, 131–141, 145–149, 311, 313, and 315; and 49 CFR 1.81, 1.87.

■ 93. Amend appendix A to part 386 by revising section II and section IV.a. through e. and g. through j. to read as follows:

Appendix A to Part 386—Penalty Schedule: Violations of Notices and Orders

* * * * *

II. Subpoena

Violation—Failure to respond to Agency subpoena to appear and testify or produce records.

Penalty—minimum of $1,330 but not more than $13,300 per violation.

* * * * *

IV. Out-of-Service Order

j. Violation—Operation of a commercial vehicle by a driver during the period the driver was placed out of service.

Penalty—Up to $2,304 per violation.

(For purposes of this violation, the term ''driver'' means an operator of a commercial motor vehicle, including an independent contractor who, while in the course of operating a commercial motor vehicle, is employed or used by another person.)

b. Violation—Requiring or permitting a driver to operate a commercial vehicle during the period the driver was placed out of service.

Penalty—Up to $23,048 per violation.

(This violation applies to motor carriers including an independent contractor who is not a ''driver,'' as defined under paragraph IV(a) above.)

c. Violation—Operation of a commercial motor vehicle or intermodal equipment by a driver after the vehicle or intermodal equipment was placed out-of-service and before the required repairs are made.

Penalty—$2,304 each time the vehicle or intermodal equipment is so operated. (This violation applies to drivers as defined in IV(a) above.)

d. Violation—Requiring or permitting the operation of a commercial motor vehicle or intermodal equipment placed out-of-service before the required repairs are made.

Penalty—Up to $23,048 each time the vehicle or intermodal equipment is so operated after notice of the defect is received.

(This violation applies to intermodal equipment providers and motor carriers, including an independent owner operator who is not a ''driver,'' as defined in IV(a) above.)

e. Violation—Failure to return written certification of correction as required by the out- of-service order.

Penalty—Up to $1,152 per violation.

* * * * *

g. Violation—Operating in violation of an order issued under § 386.72(b) to cease all or part of the employer's commercial motor vehicle operations or to cease part of an intermodal equipment provider's operations, *i.e.,* failure to cease operations as ordered.

Penalty—Up to $33,252 per day the operation continues after the effective date and time of the order to cease.

h. Violation—Operating in violation of an order issued under § 386.73.

Penalty—Up to $29,221 per day the operation continues after the effective date and time of the out-of-service order.

j. Violation—Conducting operations during a period of suspension under § 386.83 or § 386.84 for failure to pay penalties.

Penalty—Up to $18,758 for each day that operations are conducted during the suspension or revocation period.

j. Violation—Conducting operations during a period of suspension or revocation under § 385.911, § 385.913, § 385.1009, or § 385.1011 of this subchapter.

Penalty—Up to $29,221 for each day that operations are conducted during the suspension or revocation period.

■ 94. Amend appendix B to part 386 by revising paragraphs (a)(1) through (5), (b), (d) through (f), (g)(1) through (8), (10) through (14), and (16) through (18), (g)(21)(i), (g)(22) and (23), (h), and (i) to read as follows:

Appendix B to Part 386—Penalty Schedule: Violations and Monetary Penalties

* * * * *

What are the types of violations and maximum monetary penalties?

(a) * * *

(1) *Recordkeeping.* A person or entity that fails to prepare or maintain a record required by part 40 of this title and parts 382, subpart A, B, C, D, E, or F, 385, and 390 through 399 of this subchapter, or prepares or maintains a required record that is incomplete, inaccurate, or false, is subject to a maximum civil penalty of $1,544 for each day the violation continues, up to $15,445.

(2) *Knowing falsification of records.* A person or entity that knowingly falsifies, destroys, mutilates, or changes a report or record required by parts 382, subpart A, B, C, D, E, or F, 385, and 390 through 399 of this subchapter, knowingly makes or causes to be made a false or incomplete record about an operation or business fact or transaction, or knowingly makes, prepares, or preserves a record in violation of a regulation order of the Secretary is subject to a maximum civil penalty of $15,445 if such action misrepresents a fact that constitutes a violation other than a reporting or recordkeeping violation.

(3) *Non-recordkeeping violations.* A person or entity that violates part 382, subpart A, B, C, D, E, or F, part 385, or parts 390 through 399 of this subchapter, except a recordkeeping requirement, is subject to a civil penalty not to exceed $18,758 for each violation.

(4) *Non-recordkeeping violations by drivers.* A driver who violates parts 382, subpart A, B, C, D, E, or F, 385, and 390 through 399 of this subchapter, except a recordkeeping violation, is subject to a civil penalty not to exceed $4,690.

(5) *Violation of 49 CFR 392.5.* A driver placed out of service for 24 hours for violating the alcohol prohibitions of 49 CFR 392.5(a) or (b) who drives during that period is subject to a civil penalty not to exceed $3,861 for a first conviction and not less than $7,723 for a second or subsequent conviction.

* * * * *

(b) *Commercial driver's license (CDL) violations.* Any employer, employee, medical review officer, or service agent who violates any provision of 49 CFR part 382, subpart G, or any person who violates 49 CFR part 383, subpart B, C, E, F, G, or H, is subject to a civil penalty not to exceed $6,974; except:

(1) A CDL-holder who is convicted of violating an out-of-service order shall be subject to a civil penalty of not less than $3,861 for a first conviction and not less than $7,723 for a second or subsequent conviction;

(2) An employer of a CDL-holder who knowingly allows, requires, permits, or authorizes an employee to operate a CMV during any period in which the CDL-holder is subject to an out-of-service order, is subject to a civil penalty of not less than $6,974 or more than $38,612; and

(3) An employer of a CDL-holder who knowingly allows, requires, permits, or authorizes that CDL-holder to operate a CMV in violation of a Federal, State, or local law or regulation pertaining to railroad-highway grade crossings is subject to a civil penalty of not more than $20,017.

* * * * *

(d) *Financial responsibility violations.* A motor carrier that fails to maintain the levels of financial responsibility prescribed by part 387 of this subchapter or any person (except an employee who acts without knowledge) who knowingly violates the rules of part 387, subparts A and B, is subject to a maximum penalty of $20,579. Each day of a continuing violation constitutes a separate offense.

(e) *Violations of the Hazardous Materials Regulations (HMRs) and safety permitting regulations found in subpart E of part 385 of this subchapter.* This paragraph (e) applies to violations by motor carriers, drivers, shippers and other persons who transport hazardous materials on the highway in commercial motor vehicles or cause hazardous materials to be so transported.

(1) All knowing violations of 49 U.S.C. chapter 51 or orders or regulations issued under the authority of that chapter applicable to the transportation or shipment of hazardous materials by commercial motor vehicle on the highways are subject to a civil penalty of not more than $99,756 for each violation. Each day of a continuing violation constitutes a separate offense.

(2) All knowing violations of 49 U.S.C. chapter 51 or orders or regulations issued under the authority of that chapter applicable to training related to the transportation or shipment of hazardous materials by commercial motor vehicle on the highways are subject to a civil penalty of not less than $601 and not more than $99,756 for each violation.

(3) All knowing violations of 49 U.S.C. chapter 51 or orders, regulations, or exemptions under the authority of that chapter applicable to the manufacture, fabrication, marking, maintenance, reconditioning, repair, or testing of a packaging or container that is represented, marked, certified, or sold as being qualified for use in the transportation or shipment of hazardous materials by commercial motor vehicle on the highways are subject to a civil penalty of not more than $99,756 for each violation.

(4) Whenever regulations issued under the authority of 49 U.S.C. chapter 51 require compliance with the FMCSRs while transporting hazardous materials, any violations of the FMCSRs will be considered a violation of the HMRs and subject to a civil penalty of not more than $99,756.

(5) If any violation subject to the civil penalties set out in paragraphs (e)(1) through (4) of this appendix results in death, serious

illness, or severe injury to any person or in substantial destruction of property, the civil penalty may be increased to not more than $232,762 for each offense.

(f) *Operating after being declared unfit by assignment of a final ''unsatisfactory'' safety rating.* (1) A motor carrier operating a commercial motor vehicle in interstate commerce (except owners or operators of commercial motor vehicles designed or used to transport hazardous materials for which placarding of a motor vehicle is required under regulations prescribed under 49 U.S.C. chapter 51) is subject, after being placed out of service because of receiving a final ''unsatisfactory'' safety rating, to a civil penalty of not more than $33,252 (49 CFR 385.13). Each day the transportation continues in violation of a final ''unsatisfactory'' safety rating constitutes a separate offense.

(2) A motor carrier operating a commercial motor vehicle designed or used to transport hazardous materials for which placarding of a motor vehicle is required under regulations prescribed under 49 U.S.C. chapter 51 is subject, after being placed out of service because of receiving a final ''unsatisfactory'' safety rating, to a civil penalty of not more than $99,756 for each offense. If the violation results in death, serious illness, or severe injury to any person or in substantial destruction of property, the civil penalty may be increased to not more than $232,762 for each offense. Each day the transportation continues in violation of a final ''unsatisfactory'' safety rating constitutes a separate offense.

(g) * * *

(1) A person who operates as a motor carrier for the transportation of property in violation of the registration requirements of 49 U.S.C. 13901 is liable for a minimum penalty of $13,300 per violation.

(2) A person who knowingly operates as a broker in violation of registration requirements of 49 U.S.C 13904 or financial security requirements of 49 U.S.C 13906 is liable for a penalty not to exceed $13,300 for each violation.

(3) A person who operates as a motor carrier of passengers in violation of the registration requirements of 49 U.S.C. 13901 is liable for a minimum penalty of $33,252 per violation.

(4) A person who operates as a foreign motor carrier or foreign motor private carrier of property in violation of the provisions of 49 U.S.C. 13902(c) is liable for a minimum penalty of $13,300 per violation.

(5) A person who operates as a foreign motor carrier or foreign motor private carrier without authority, outside the boundaries of a commercial zone along the United States-Mexico border, is liable for a maximum penalty of $18,291 for an intentional violation and a maximum penalty of $45,730 for a pattern of intentional violations.

(6) A person who operates as a motor carrier or broker for the transportation of hazardous wastes in violation of the registration provisions of 49 U.S.C. 13901 is liable for a minimum penalty of $26,602 and a maximum penalty of $53,203 per violation.

(7) A motor carrier or freight forwarder of household goods, or their receiver or trustee, that does not comply with any regulation relating to the protection of individual shippers, is liable for a minimum penalty of $2,000 per violation.

(8) A person as described under paragraph (i) or (ii) is liable for a minimum penalty of $4,005 for the first violation and $10,009 for each subsequent violation—

(i) Who falsifies, or authorizes an agent or other person to falsify, documents used in the transportation of household goods by motor carrier or freight forwarder to evidence the weight of a shipment; or

(ii) Who charges for services which are not performed or are not reasonably necessary in the safe and adequate movement of the shipment.

* * * * *

(10) A person who offers, gives, solicits, or receives transportation of property by a carrier at a different rate than the rate in effect under 49 U.S.C. 13702 is liable for a maximum penalty of $200,174 per violation. When acting in the scope of his/her employment, the acts or omissions of a person acting for or employed by a carrier or shipper are considered the acts or omissions of that carrier or shipper, as well as of that person.

(11) Any person who offers, gives, solicits, or receives a rebate or concession related to motor carrier transportation subject to jurisdiction under subchapter I of 49 U.S.C. chapter 135, or who assists or permits another person to get that transportation at less than the rate in effect under 49 U.S.C. 13702, commits a violation for which the penalty is $400 for the first violation and $500 for each subsequent violation.

(12) A freight forwarder, its officer, agent, or employee, that assists or willingly permits a person to get service under 49 U.S.C. 13531 at less than the rate in effect under 49 U.S.C. 13702 commits a violation for which the penalty is up to $1,002 for the first violation and up to $4,005 for each subsequent violation.

(13) A person who gets or attempts to get service from a freight forwarder under 49 U.S.C. 13531 at less than the rate in effect under 49 U.S.C. 13702 commits a violation for which the penalty is up to $1,002 for the first violation and up to $4,005 for each subsequent violation.

(14) A person who knowingly authorizes, consents to, or permits a violation of 49 U.S.C. 14103 relating to loading and unloading motor vehicles or who knowingly violates subsection (a) of 49 U.S.C. 14103 is liable for a penalty of not more than $20,017 per violation.

* * * * *

(16) A person required to make a report to the Secretary, answer a question, or make, prepare, or preserve a record under part B of subtitle IV, title 49, U.S.C., or an officer, agent, or employee of that person, is liable for a minimum penalty of $1,330 and for a maximum penalty of $10,009 per violation if it does not make the report, does not completely and truthfully answer the question within 30 days from the date the Secretary requires the answer, does not make or preserve the record in the form and manner prescribed, falsifies, destroys, or changes the report or record, files a false report or record, makes a false or incomplete entry in the record about a business-related fact, or prepares or preserves a record in violation of a regulation or order of the Secretary.

(17) A motor carrier, water carrier, freight forwarder, or broker, or their officer, receiver, trustee, lessee, employee, or other person authorized to receive information from them, who discloses information identified in 49 U.S.C. 14908 without the permission of the shipper or consignee is liable for a maximum penalty of $4,005.

(18) A person who violates a provision of part B, subtitle IV, title 49, U.S.C., or a regulation or order under part B, or who violates a condition of registration related to transportation that is subject to jurisdiction under subchapter I or III of chapter 135, or who violates a condition of registration of a foreign motor carrier or foreign motor private carrier under section 13902, is liable for a penalty of $1,002 for each violation if another penalty is not provided in 49 U.S.C. chapter 149.

* * * * *

(21) * * *

(i) Who knowingly and willfully fails, in violation of a contract, to deliver to, or unload at, the destination of a shipment of household goods in interstate commerce for which charges have been estimated by the motor carrier transporting such goods, and for which the shipper has tendered a payment in accordance with part 375, subpart G, of this subchapter, is liable for a civil penalty of not less than $20,017 for each violation. Each day of a continuing violation constitutes a separate offense.

* * * * *

(22) A broker for transportation of household goods who makes an estimate of the cost of transporting any such goods before entering into an agreement with a motor carrier to provide transportation of household goods subject to FMCSA jurisdiction is liable to the United States for a civil penalty of not less than $15,445 for each violation.

(23) A person who provides transportation of household goods subject to jurisdiction under 49 U.S.C. chapter 135, subchapter I, or provides broker services for such transportation, without being registered under 49 U.S.C. chapter 139 to provide such transportation or services as a motor carrier or broker, as the case may be, is liable to the United States for a civil penalty of not less than $38,612 for each violation.

(h) *Copying of records and access to equipment, lands, and buildings.* A person subject to 49 U.S.C. chapter 51 or a motor carrier, broker, freight forwarder, or owner or operator of a commercial motor vehicle subject to part B of subtitle VI of title 49 U.S.C. who fails to allow promptly, upon demand in person or in writing, the Federal Motor Carrier Safety Administration, an employee designated by the Federal Motor Carrier Safety Administration, or an employee of a MCSAP grant recipient to inspect and copy any record or inspect and examine equipment, lands, buildings, and other property, in accordance with 49 U.S.C. 504(c), 5121(c), and 14122(b), is subject to a civil penalty of not more than $1,544 for each

offense. Each day of a continuing violation constitutes a separate offense, except that the total of all civil penalties against any violator for all offenses related to a single violation shall not exceed $15,445.

(i) *Evasion.* A person, or an officer, employee, or agent of that person:

(1) Who by any means tries to evade regulation of motor carriers under title 49, United States Code, chapter 5, chapter 51, subchapter III of chapter 311 (except sections 31138 and 31139) or section 31302, 31303, 31304, 31305(b), 31310(g)(1)(A), or 31502, or a regulation in subtitle B, chapter I, subchapter C of this title, or this subchapter, issued under any of those provisions, shall be fined at least $2,661 but not more than $6,650 for the first violation and at least $3,323 but not more than $9,965 for a subsequent violation.

(2) Who tries to evade regulation under part B of subtitle IV, title 49, U.S.C., for carriers or brokers is liable for a penalty of at least $2,661 for the first violation or at least $6,650 for a subsequent violation.

PART 578—CIVIL AND CRIMINAL PENALTIES

■ 95. The authority citation for part 578 continues to read as follows:

Authority: Pub. L. 92–513, Pub. L. 94–163, Pub. L. 98–547, Pub. L. 101–410, Pub. L. 102–388, Pub. L. 102–519, Pub. L. 104–134, Pub. L. 109–59, Pub. L. 110–140, Pub. L. 112–141, Pub. L. 114–74, Pub. L. 114–94 (49 U.S.C. 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, 33114, and 33115); delegation of authority at 49 CFR 1.81, 1.95.

■ 96. Amend § 578.6 by revising paragraphs (a)(1), (a)(2)(i)(B), (a)(3) and (4), (b) through (g), (h)(1), (h)(2) introductory text, (h)(3), and (i) to read as follows:

§ 578.6 Civil penalties for violations of specified provisions of Title 49 of the United States Code.

(a) * * *

(1) *In general.* A person who violates any of sections 30112, 30115, 30117 through 30122, 30123(a), 30125(c), 30127, or 30141 through 30147 of Title 49 of the United States Code or a regulation in this chapter prescribed under any of those sections is liable to the United States Government for a civil penalty of not more than $27,168 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle equipment and for each failure or refusal to allow or perform an act required by any of those sections. The maximum civil penalty under this paragraph (a)(1) for a related series of violations is $135,828,178.

(2) * * *

(i) * * *

(B) Violates section 30112(a)(2) of Title 49 United States Code, shall be subject to a civil penalty of not more than $15,445 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle equipment and for each failure or refusal to allow or perform an act required by this section. The maximum penalty under this paragraph (a)(2)(i)(B) for a related series of violations is $23,167,823.

(3) *Section 30166.* A person who violates Section 30166 of Title 49 of the United States Code or a regulation in this chapter prescribed under that section is liable to the United States Government for a civil penalty for failing or refusing to allow or perform an act required under that section or regulation. The maximum penalty under this paragraph (a)(3) is $27,168 per violation per day. The maximum penalty under this paragraph (a)(3) for a related series of daily violations is $135,828,178.

(4) *False and misleading reports.* A person who knowingly and willfully submits materially false or misleading information to the Secretary, after certifying the same information as accurate under the certification process established pursuant to Section 30166(o) of Title 49 of the United States Code, shall be subject to a civil penalty of not more than $6,650 per day. The maximum penalty under this paragraph (a)(4) for a related series of daily violations is $1,330,069.

(b) *National Automobile Title Information System.* An individual or entity violating 49 U.S.C. Chapter 305 is liable to the United States Government for a civil penalty of not more than $2,168 for each violation.

(c) *Bumper standards.* (1) A person that violates 49 U.S.C. 32506(a) is liable to the United States Government for a civil penalty of not more than $3,558 for each violation. A separate violation occurs for each passenger motor vehicle or item of passenger motor vehicle equipment involved in a violation of 49 U.S.C. 32506(a)(1) or (4)—

(i) That does not comply with a standard prescribed under 49 U.S.C. 32502; or

(ii) For which a certificate is not provided, or for which a false or misleading certificate is provided, under 49 U.S.C. 32504.

(2) The maximum civil penalty under this paragraph (c) for a related series of violations is $3,961,763.

(d) *Consumer information*—(1) *Crash-worthiness and damage susceptibility.* A person who violates 49 U.S.C. 32308(a), regarding crashworthiness and damage susceptibility, is liable to the United States Government for a civil penalty of not more than $3,558 for each violation. Each failure to provide information or comply with a regulation in violation of 49 U.S.C. 32308(a) is a separate violation. The maximum penalty under this paragraph (d)(1) for a related series of violations is $1,940,403.

(2) *Consumer tire information.* Any person who fails to comply with the national tire fuel efficiency program under 49 U.S.C. 32304A is liable to the United States Government for a civil penalty of not more than $73,628 for each violation.

(e) *Country of origin content labeling.* A manufacturer of a passenger motor vehicle distributed in commerce for sale in the United States that willfully fails to attach the label required under 49 U.S.C. 32304 to a new passenger motor vehicle that the manufacturer manufactures or imports, or a dealer that fails to maintain that label as required under 49 U.S.C. 32304, is liable to the United States Government for a civil penalty of not more than $2,168 for each violation. Each failure to attach or maintain that label for each vehicle is a separate violation.

(f) *Odometer tampering and disclosure.* (1) A person that violates 49 U.S.C. Chapter 327 or a regulation in this chapter prescribed or order issued thereunder is liable to the United States Government for a civil penalty of not more than $13,300 for each violation. A separate violation occurs for each motor vehicle or device involved in the violation. The maximum civil penalty under this paragraph (f)(1) for a related series of violations is $1,330,069.

(2) A person that violates 49 U.S.C. Chapter 327 or a regulation in this chapter prescribed or order issued thereunder, with intent to defraud, is liable for three times the actual damages or $13,300, whichever is greater.

(g) *Vehicle theft protection.* (1) A person that violates 49 U.S.C. 33114(a)(1)-(4) is liable to the United States Government for a civil penalty of not more than $2,922 for each violation. The failure of more than one part of a single motor vehicle to conform to an applicable standard under 49 U.S.C. 33102 or 33103 is only a single violation. The maximum penalty under this paragraph (g)(1) for a related series of violations is $730,455.

(2) A person that violates 49 U.S.C. 33114(a)(5) is liable to the United States Government for a civil penalty of not more than $216,972 a day for each violation.

(h) *Automobile fuel economy.* (1) A person that violates 49 U.S.C. 32911(a) is liable to the United States Government for a civil penalty of not more than $51,139 for each violation. A separate violation occurs for each day the violation continues.

(2) Except as provided in 49 U.S.C. 32912(c), a manufacturer that violates a standard prescribed for a model year under 49 U.S.C. 32902 is liable to the United States Government for a civil penalty of $17 (for model years before model year 2019, the civil penalty is $5.50; for model years 2019 through 2021, the civil penalty is $14; for model year 2022, the civil penalty is $15; for model year 2023, the civil penalty is $16), multiplied by each .1 of a mile a gallon by which the applicable average fuel economy standard under that section exceeds the average fuel economy—

* * * * *

(3) If a higher amount for each .1 of a mile a gallon to be used in calculating a civil penalty under paragraph (h)(2) of this section is prescribed pursuant to the process provided in 49 U.S.C. 32912(c), the amount prescribed may not be more than $32 for each .1 of a mile a gallon.

(i) *Medium- and heavy-duty vehicle fuel efficiency.* The maximum civil penalty for a violation of the fuel consumption standards of 49 CFR part 535 is not more than $50,360 per vehicle or engine. The maximum civil penalty for a related series of violations shall be determined by multiplying $50,360 times the vehicle or engine production volume for the model year in question within the regulatory averaging set.

Signed in Washington, DC, on December 15, 2023.

Peter Paul Montgomery Buttigieg,

Secretary of Transportation.

[FR Doc. 2023–28066 Filed 12–27–23; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2396; Project Identifier MCAI–2023–01147–R; Amendment 39–22641; AD 2023–25–14]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–27–09, which applied to certain Airbus Helicopters Model EC130T2 helicopters. AD 2022–27–09 required repetitively inspecting the vibration level on the tail rotor drive shaft and, depending on the results, taking corrective action. AD 2022–27–09 also required reporting information and prohibited installing certain rotor drive shafts unless the inspection was done. Since the FAA issued AD 2022–27–09, Airbus Helicopters revised its service information to update the procedures for inspecting that vibration level, reduce an allowable vibration level, and clarify when a balance correction may be accomplished. This AD was prompted by the determination that a certain vibration measurement tool was providing unexpected results and therefore the threshold must be revised. This AD continues to require certain actions in AD 2022–27–09 and also revises the procedures for inspecting the vibration level on the tail rotor drive shaft and depending on these results, requires replacing certain parts, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 12, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of December 28, 2023.

The FAA must receive comments on this AD by February 12, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Material Incorporated by Reference:

- For EASA material identified in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* You may find this material on the website *ad.easa.europa.eu*.
- You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Parkway, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222 5110.

Other Related Service Information:

- For Airbus Helicopters service information identified in this final rule, contact Airbus Helicopters, 2701 North Forum Drive, Grand Prairie, TX 75052; phone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *airbus.com/en/products-services/helicopters/hcare-services/airbusworld*. You may also view this service information at the FAA contact information under *Material Incorporated by Reference* above.

Examining the AD Docket

You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–2396; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the EASA AD, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Dan McCully, Aviation Safety Engineer, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (404) 474–5548; email *william.mccully@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–2396; Project Identifier MCAI–2023–01147–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act

(FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Dan McCully, Aviation Safety Engineer, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (404) 474–5548; email *william.mccully@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2022–27–09, Amendment 39–22294 (88 FR 2199, January 13, 2023) (AD 2022–27–09), for certain Airbus Helicopters Model EC130T2 helicopters. AD 2022–01–05 was prompted by EASA Emergency AD 2022–0251–E, dated December 14, 2022 (EASA AD 2022–0251–E), originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA AD 2022–0251–E was issued to correct an unsafe condition on Airbus Helicopters Model EC 130 T2 helicopters with modification 079809 incorporated in production. AD 2022–27–09 required repetitively inspecting the balancing of the tail rotor drive shaft by measuring the vibration level. Depending on the results, AD 2022–27–09 required accomplishing corrective action in accordance with a method approved by the FAA, EASA, or Airbus Helicopters' EASA Design Organization Approval, and reporting the results to Airbus Helicopters. Lastly, AD 2022–27–09 prohibited installing certain part-numbered tail rotor drive shafts on any helicopter unless its requirements were met. The FAA issued AD 2022–27–09 to address an excessive vibration level on the tail rotor drive shaft, which could result in failure of the tail rotor drive shaft and subsequent loss of yaw control of the helicopter.

Actions Since AD 2022–27–09 Was Issued

Since the FAA issued AD 2022–27–09, EASA superseded EASA AD 2022–0251–E by issuing EASA Emergency AD 2023–0190–E, dated November 2, 2023 (EASA AD 2023–0190–E), to correct an unsafe condition on Airbus Helicopters Model EC 130 T2 helicopters with modification 079809 incorporated in production. EASA AD 2023–0190–E states that it was identified that one of the vibration measurement tools was providing different results than expected and therefore it was determined that the threshold must be revised. Consequently, Airbus Helicopter revised its service information to provide updated vibration inspection instructions, reduce an allowable vibration level, and clarify when a balance correction may be accomplished. Accordingly, EASA AD 2023–0190–E retains the requirements of EASA AD 2022–0251–E and depending on the results of the updated vibration inspection, requires replacing certain parts with new (zero total hours time-in-service) parts. Additionally, EASA AD 2023–0190–E prohibits performing a balance correction unless it is performed concurrently with replacement of certain parts by following certain procedures. However, if a balance correction has already been performed independent of replacing the sliding flange and the splined sleeve equipped, EASA AD 2023–0190–E requires contacting Airbus Helicopter for further approved instructions. EASA considers its AD an interim action and states that further AD action may follow. See EASA AD 2023–0190–E for additional background information.

Additionally, the FAA discovered that an incorrect U.S. fleet count was provided in the Costs of Compliance section of AD 2022–27–09. This AD corrects that count.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0190–E requires repetitively checking the balancing of the tail rotor drive shaft by measuring the vibration level. Depending on the results, EASA AD 2023–0190–E requires replacing certain parts with new parts. EASA AD 2023–0190–E also prohibits performing a balance correction unless this action is performed concurrently with replacing certain parts. If a balance correction has already been performed independently of replacing those parts, EASA AD 2023–0190–E requires contacting Airbus Helicopters to obtain approved instructions and accomplishing those instructions. EASA AD 2023–0190–E also requires reporting the vibration measurements to Airbus Helicopters. Lastly, EASA AD 2023–0190–E prohibits installing certain part-numbered tail rotor drive shafts on any helicopter unless its requirements are met.

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Other Related Service Information

The FAA reviewed Airbus Helicopters Emergency Alert Service Bulletin No. EC130–05A042, Revision 1, dated November 2, 2023 (EASB EC130–05A042 Rev 1). This service information specifies procedures for measuring the vibration level on the tail rotor drive shaft, reporting the results to Airbus Helicopters, and replacing the sliding flange and the splined sleeve equipped.

The FAA also reviewed AMM Task 65–11–01,5–1A, Adjustment—Balancing of the tail rotor drive line (with the STEADY Control tuning equipment)—Tail Drive Line POST MOD 079809 and AMM Task 65–11–01,5–1B, Adjustment—Balancing of the tail rotor drive shaft (with the VIBREX 2000 adjustment equipment)—Tail Drive Line POST MOD 079809, both Update 2 and dated July 3, 2022. This service information specifies procedures for measuring the vibration level on the tail rotor drive shaft, analyzing the results, and balancing the tail rotor drive line or shaft.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA of the unsafe condition described in its emergency AD. The FAA is issuing this AD after evaluating all pertinent information and determining that the unsafe condition exists and is likely to exist or develop on other helicopters of the same type design.

AD Requirements

This AD retains certain requirements of AD 2022–27–09. This AD also requires accomplishing the actions specified in EASA AD 2023–0190–E, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD and except as discussed under ''Differences Between this AD and the EASA Emergency AD.''

EASA AD 2023–0190–E refers to EASB EC130–05A042 Rev 1, for compliance times to replace the spline sleeve equipped and sliding flange. This AD requires those compliance times, as incorporated by reference, and are as follows:

Task used	Vibration measurement result	Compliance time
The maintenance task A: AH EC130 Aircraft Maintenance Manual (AMM) Task 65–11–01,5–1A (''Balancing of the tail rotor drive line'').	If the vibration level is equal to or more than 1.4 and less than 1.8 IPS.	Within 30 hours time-in-service (TIS) after the last inspection.
	If the vibration level is equal to or more than 1.8 and less than 2.6 IPS.	Within 15 hours TIS after the last inspection.
	If the vibration level is equal to or more than 2.6 IPS	Before further flight.
The maintenance task B: AH EC130 AMM Task 65–11–01,5–1B (''Balancing of the tail rotor drive shaft'').	If the vibration level is equal to or more than 0.7 and less than 0.9 IPS.	Within 30 hours TIS after the last inspection; or, if the last inspection was done before the effective date of this AD and more than 30 hours TIS have passed since that inspection, before further flight.
	If the vibration level is equal to or more than 0.9 and less than 1.3 IPS.	Within 15 hours TIS after the last inspection; or, if the last inspection was done before the effective date of this AD and more than 15 hours TIS have passed since that inspection, before further flight.
	If the vibration level is equal to or more than 1.3 IPS	Before further flight.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, EASA AD 2023–0190–E will be incorporated by reference in this FAA final rule. This AD would, therefore, require compliance with EASA AD 2023–0190–E in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0190–E does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0190–E. Service information referenced in EASA AD 2023–0190–E for compliance will be available at *regulations.gov* by searching for and locating Docket No. FAA–2023–2396 after the FAA final rule is published.

Differences Between This AD and the EASA Emergency AD

EASA AD 2023–0190–E requires tail rotor drive shaft checks, whereas this AD requires tail rotor drive shaft inspections because those actions must be accomplished by persons authorized under 14 CFR 43.3.

For helicopters that accomplished a balance correction in accordance with the instructions of the applicable AMM before the effective date of EASA AD 2023–0190–E, except if this balance correction was accomplished before next flight after replacing the sliding flange and the splined sleeve equipped, EASA AD 2023–0190–E requires contacting AH [Airbus Helicopters] to obtain approved instructions, and within the compliance time(s) specified therein, accomplishing those instructions accordingly. Whereas, for helicopters that accomplished a balance correction in accordance with the instructions of the applicable AMM before the effective date of this AD, except not those that only accomplished a balance correction before the next flight after installing a new (zero total hours time-in-service) sliding flange and a new (zero total hours time-in-service) splined sleeve equipped, this AD requires corrective action accomplished in accordance with a method approved by the FAA, EASA, or Airbus Helicopters' EASA Design Organization Approval.

EASA AD 2023–0190–E requires reporting information to AH [Airbus Helicopters], whereas this AD does not.

EASA AD 2023–0190–E allows credit for the initial instance of the vibration measurements accomplished before its effective date, whereas this AD allows credit for any instance of the vibration measurements accomplished before the effective date of this AD.

EASA AD 2023–0190–E prohibits performing a balance correction, except if it is accomplished as part of its requirements. This AD does not, because such a compliance time would be difficult to enforce.

Interim Action

The FAA considers this AD interim action. If final action is later identified, the FAA might consider further rulemaking then.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies foregoing notice and comment prior to adoption of this rule because the tail rotor drive shaft is critical to the control of a helicopter and a failure of the tail rotor drive shaft could occur during any phase of flight without previous indication. The FAA also has no information pertaining to how quickly the condition may propagate to failure. In light of this and, depending how many hours the helicopter has accumulated, for some operators the initial inspection must be accomplished before further flight. For other operators, the initial inspection must be accomplished before accumulating 50 total hours time-in-service or within three months, whichever occurs first, which is shorter than the time necessary for the public to comment and for publication of the final rule. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B).

In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forgo notice and comment.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without prior notice and comment, RFA analysis is not required.

Costs of Compliance

The FAA estimates that this AD affects 117 helicopters of U.S. Registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Inspecting the tail rotor drive shaft takes approximately 4 work-hours for an estimated cost of $340 per helicopter and $39,780 for the U.S. fleet, per inspection cycle.

If required, replacing the sliding flange and the splined sleeve equipped takes approximately 40 work-hours and parts cost $3,420 for an estimated cost of $6,820, per replacement cycle.

For helicopters that accomplished a balance correction in accordance with the instructions of the applicable AMM before the effective date of this AD, except not those that only accomplished a balance correction before the next flight after installing a new (zero total hours time-in-service) sliding flange and a new (zero total hours time-in-service) splined sleeve equipped, the corrective action that may be needed could vary significantly from helicopter to helicopter. The FAA has no data to determine the costs to accomplish the corrective action or the number of helicopters that may require corrective action.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866, and

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive 2022–27–09, Amendment 39–22294 (88 FR 2199, January 13, 2023); and

■ b. Adding the following new airworthiness directive:

2023–25–14 Airbus Helicopters: Amendment 39–22641; Docket No. FAA–2023–2396; Project Identifier MCAI–2023–01147–R.

(a) Effective Date

This airworthiness directive (AD) is effective January 12, 2024.

(b) Affected ADs

This AD replaces AD 2022–27–09, Amendment 39–22294 (88 FR 2199, January 13, 2023) (AD 2022–27–09).

(c) Applicability

This AD applies to Airbus Helicopters Model EC130T2 helicopters, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) Emergency AD 2023–0190–E, dated November 2, 2023 (EASA AD 2023–0190–E).

(d) Subject

Joint Aircraft Service Component (JASC) Code: 6510, Tail Rotor Drive Shaft.

(e) Unsafe Condition

This AD was prompted by a report of a crack in the tailboom. The FAA is issuing this AD to address an excessive vibration level on the tail rotor drive shaft. The unsafe condition, if not addressed, could result in failure of the tail rotor drive shaft and subsequent loss of yaw control of the helicopter.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Requirements

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2023–0190–E.

(h) Exceptions to EASA AD 2023–0190–E

(1) Where EASA AD 2023–0190–E requires compliance in terms of flight hours, this AD requires using hours time-in-service.

(2) Where EASA AD 2023–0190–E refers to the effective date of December 16, 2022 (the effective date of EASA AD 2022–0251–E, dated December 14, 2022), this AD requires using the effective date of January 30, 2023 (the effective date of AD 2022–27–09).

(3) Where EASA AD 2023–0190–E refers to its effective date, this AD requires using the effective date of this AD.

(4) Where EASA AD 2023–0190–E refers to tail rotor drive shaft checks, this AD requires tail rotor drive shaft inspections.

(5) Where Note 1 of EASA AD 2023–0190–E states, ''Unless indicated otherwise, the FH specified in Table 1 of this AD are those accumulated by the helicopter since first flight, or since the installation of the new spline sleeve equipped and sliding flange;'' for this AD, replace that text with ''Unless indicated otherwise, the hours time-in-service specified in Table 1 of this AD are those accumulated by the helicopter since first flight, or since the installation of the new spline sleeve equipped and sliding flange, as applicable to your helicopter.''

(6) This AD does not allow the provisions in Note 2 of EASA AD 2023–0190–E or Note 2 in the ASB referenced in EASA AD 2023–0190–E. Refer to paragraph (j) of this AD for special flight permit information.

(7) Where paragraphs (2) and (3) of EASA AD 2023–0190–E require removing parts, this AD requires removing those parts from service.

(8) Where paragraph (4) of EASA AD 2023–0190–E specifies to ''contact AH [Airbus Helicopters] to obtain approved instructions, and within the compliance time(s) specified therein, accomplish those instructions accordingly;'' for this AD, replace that text with ''accomplish corrective action in accordance with a method approved by the Manager, International Validation Branch, FAA; or EASA; or Airbus Helicopters' EASA

Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.''

(9) This AD does not require compliance with paragraph (5) of EASA AD 2023–0190–E.

Note 1 paragraph (h)(9): Accomplishing a balance correction other than with the replacement of tail rotor drive line parts could interfere with subsequent tail rotor drive line balancing inspections. Airbus Helicopters Emergency Alert Service Bulletin No. EC130–05A042, Revision 1, dated November 2, 2023, contains additional information regarding balance corrections.

(10) This AD does not require compliance with paragraph (6) of EASA AD 2023–0190–E.

(11) Instead of the credit allowed in paragraph (7) of EASA AD 2023–0190–E, you may take credit for the vibration measurements required by paragraph (1) of EASA AD 2023–0190–E that have been accomplished before the effective date of this AD using Airbus Helicopters Emergency Alert Service Bulletin No. EC130–05A042, Revision 0, dated December 14, 2022.

(12) Instead of the credit allowed in paragraph (8) of EASA AD 2023–0190–E, you may take credit for accomplishing ''maintenance task B,'' as defined in EASA AD 2023–0190–E and required by paragraph (3) of EASA AD 2023–0190–E, to satisfy the initial instance of ''maintenance task B,'' as defined in EASA AD 2023–0190–E and required by paragraph (2) of EASA AD 2023–0190–E.

(13) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0190–E.

(i) No Reporting Requirement

Although the service information referenced in EASA AD 2023–0190–E specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 only to operate the helicopter to a maintenance location for the initial tail rotor drive shaft inspection, provided no passengers are onboard.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, send it to the attention of the person identified in paragraph (l)(1) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(l) Additional Information

(1) For more information about this AD, contact Dan McCully, Aviation Safety Engineer, FAA, 1600 Stewart Ave., Suite 410, Westbury, NY 11590; telephone (404) 474–5548; email *william.mccully@faa.gov.*

(2) For Airbus Helicopters service information identified in this AD that is not incorporated by reference, contact Airbus Helicopters, 2701 North Forum Drive, Grand Prairie, TX 75052; phone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *airbus.com/en/products-services/helicopters/hcare-services/airbusworld.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Parkway, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) European Union Aviation Safety Agency (EASA) Emergency AD 2023–0190–E, dated November 2, 2023.

(ii) [Reserved]

(3) For EASA material, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find the EASA material on the EASA website *ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Parkway, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.*

Issued on December 22, 2023.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–28720 Filed 12–26–23; 11:15 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

15 CFR Part 231

[Docket No. 231218–0308]

RIN 0693–AB70

Preventing the Improper Use of CHIPS Act Funding; Revised Definition of ''Material Expansion''

AGENCY: CHIPS Program Office, National Institute of Standards and Technology, Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce (the Department), through the National Institute of Standards and Technology, is amending the definition of ''material expansion'' in the September 25, 2023 final rule, Preventing the Improper Use of CHIPS Act Funding, to clarify that the construction of new semiconductor manufacturing facilities falls within the scope of the rule.

DATES: This final rule is effective on December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Vikram Viswanathan at (240) 309–9040 or *askchips@chips.gov.* Please direct media inquiries to the CHIPS Press Team at *press@chips.gov.*

SUPPLEMENTARY INFORMATION:

Background

The CHIPS Act, 15 U.S.C. 4651, *et seq.,* established a semiconductor incentives program (CHIPS Incentives Program) to incentivize, through Federal funding, investments in the construction, expansion, and modernization of facilities and equipment in the United States for the fabrication, assembly, testing, advanced packaging, production, or research and development of semiconductors, materials used to manufacture semiconductors, or semiconductor manufacturing equipment. The CHIPS Incentives Program is administered by the CHIPS Program Office (CPO) within the National Institute of Standards and Technology (NIST) of the Department.

On March 23, 2023, CPO published a proposed rule that requested comment on defined terms used in the Act (including terms that will be used in required agreements with covered entities), identified the types of transactions that are prohibited under the Expansion Clawback and Technology Clawback sections of the Act, and provided a description of the proposed process for notification of certain transactions to the Secretary (88

FR 17439). After considering extensive public comments, on September 25, 2023, CPO published a final rule Preventing the Improper Use of CHIPS Act Funding (88 FR 65600). Among other issues, the final rule addressed the Expansion Clawback, which prohibits the covered entity and members of its affiliated group from engaging in any significant transaction involving the material expansion of semiconductor manufacturing capacity in a foreign country of concern. The final rule also addressed the exceptions to this general prohibition.

The definition of ''material expansion,'' which is used both in the general prohibition and in one of the exceptions, focused on the expansion of ''existing'' semiconductor manufacturing facilities, which created confusion as to whether the construction of entirely new semiconductor fabrication facilities fell within the scope of the final rule. This update to the final rule clarifies that new facilities are included within the scope of the final rule.

Changes From the Final Rule

Definition of Material Expansion

The final rule defines ''material expansion'' as an ''increase of the semiconductor manufacturing capacity of an existing facility by more than five percent of the capacity memorialized in the required agreement due to the addition of a cleanroom, production line or other physical space, or a series of such additions.'' 15 CFR 231.108.

Defining material expansion in relation to ''an existing facility'' had the unintended effect of suggesting that the construction of new semiconductor facilities fell outside the scope of the Expansion Clawback. Such an interpretation would be inconsistent with the CHIPS Act and the general restrictions of the Expansion Clawback, which significantly limit the ability of covered entities to expand their semiconductor manufacturing capacity in foreign countries of concern. Indeed, CPO made clear in the proposed rule and in the preamble to the final rule that the restrictions of the Expansion Clawback were intended to apply to the construction of a new facility. In the preamble of the proposed rule, CPO noted that the term ''material expansion'' included ''*the construction of new facilities* and the addition of new semiconductor manufacturing capacity and uses a quantitative measure of 5 percent of existing capacity to provide clear and predictable scoping.'' 88 FR 17439, 17441 (emphasis added). Further, the definition in the proposed rule provides: ''Material expansion means the addition of physical space or equipment that has the purpose or effect of increasing semiconductor manufacturing capacity of a facility by more than five percent or a series of such expansions which, in the aggregate during the applicable term of a required agreement, increase the semiconductor manufacturing capacity of a facility by more than five percent of the existing capacity when the required agreement was entered into.'' *Id.* at 17447. This definition used the term ''facility'' generally, resulting in an interpretation that a facility may be either new or existing.

Commenters also understood that the Expansion Clawback was intended to address the construction of new semiconductor facilities. CPO received 27 comment submissions, and a significant portion of those comments related to material expansion. Numerous commenters noted that the intent of the CHIPS Act was to allow existing facilities in a foreign country of concern to continue to operate so that ongoing operations would not be undermined and so funding recipients and could realize the value of their prior investments. Commenters did not raise significant concerns with placing restrictions on the construction of new facilities, and in some instances suggested that the definition of material expansion be modified to clarify that it was triggered by new construction (''material expansion means building new cleanroom space that does not exist on the date of the [award];'' material expansion should apply to ''building new clean room/physical space''). There was a general understanding that the Expansion Clawback was intended to address new construction.

In the final rule, CPO provided explanations that reflect the intent for the Expansion Clawback to address the construction of new facilities. In response to comments on the definition of Significant Renovations, CPO noted that ''[w]ithout the concept of significant renovations, covered entities could evade the expansion prohibition simply by significantly expanding an existing facility rather than *constructing a new facility.*'' 88 FR 65600, 65607. This response assumes that the construction of new facilities was addressed by the Expansion Clawback, and that the concept of significant renovations was needed to prevent circumvention of that prohibition.

In this rule, the modified definition of ''material expansion'' better reflects the intended scope of the Expansion Clawback.

Classification

Administrative Procedure Act (APA)

Pursuant to 5 U.S.C. 553(a)(2), the provisions of the APA requiring notice of proposed rulemaking and the opportunity for public participation are inapplicable to this rule, which places certain limitations on funding recipients, because it relates to ''public property, loans, grants, benefits, or contracts.'' [1] Additionally, although it was not required to do so, the Department, through the March 23, 2023, proposed rule, provided advance notice and opportunity for public comment on the definition of the term ''material expansion.''

This final rule simply corrects an inadvertent omission in the definition of ''material expansion,'' thereby accurately reflecting the Department's explanation and discussion of public comments in the September 25, 2023, final rule. Additional advance notice and opportunity for comment would neither provide new information to the public nor inform any agency decision-making regarding the defined term. Finally, additional opportunity for public comment would be contrary to the public interest, under 5 U.S.C. 553(b)(B), because this rule provides clarity to applicants and awardees.

Executive Order 13132

This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553(a)(2), the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

Paperwork Reduction Act

This action does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*).

[1] The provisions of this amendment implement the Expansion Clawback provisions of the Act and are also thus exempt from the rulemaking provisions of the APA pursuant to 15 U.S.C. 4652(a)(6)(A)(iii).

List of Subjects in 15 CFR Part 231

Business and industry, Computer technology, Exports, Foreign Trade, Government contracts, Grant Programs, Investments (US investments abroad), National defense, Research, Science & Technology, and Semiconductor chip products.

For reasons set out in the preamble, 15 CFR part 231 is amended as follows:

PART 231—CLAWBACKS OF CHIPS FUNDING

■ 1. The authority citation for 15 CFR part 231 continues to read as follows:

Authority: 15 U.S.C. 4651, *et seq.*

■ 2. Revise § 231.108 to read as follows:

§ 231.108 Material expansion.

Material expansion means:

(1) with respect to an existing facility, the increase of the semiconductor manufacturing capacity of that facility by more than five percent of the capacity memorialized in the required agreement due to the addition of a cleanroom, production line or other physical space, or a series of such additions; or

(2) any construction of a new facility for semiconductor manufacturing.

Tamiko Ford,

NIST Executive Secretariat.

[FR Doc. 2023–28627 Filed 12–27–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 587

Publication of Russian Harmful Foreign Activities Sanctions Regulations Web General License 78

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of a web general license.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing one general license (GL) issued pursuant to the Russian Harmful Foreign Activities Sanctions Regulations: GL 78, which was previously made available on OFAC's website.

DATES: GL 78 was issued on December 1, 2023. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

FOR FURTHER INFORMATION CONTACT: OFAC: Assistant Director for Licensing, 202–622–2480; Assistant Director for Regulatory Affairs, 202–622–4855; or Assistant Director for Compliance, 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

This document and additional information concerning OFAC are available on OFAC's website: *https://ofac.treasury.gov.*

Background

On December 1, 2023, OFAC issued GL 78 to authorize certain transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587. GL 78 was made available on OFAC's website (*https://ofac.treasury.gov*) when it was issued. The text of this GL is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Russian Harmful Foreign Activities Sanctions Regulations

31 CFR Part 587

General License No. 78

Authorizing Limited Safety and Environmental Transactions Involving Certain Persons or Vessels Blocked on December 1, 2023

(a) Except as provided in paragraph (c) of this general license, all transactions prohibited by Executive Order (E.O.) 14024 that are ordinarily incident and necessary to one of the following activities involving the blocked persons or vessels described in paragraph (b) are authorized through 12:01 a.m. eastern standard time, February 29, 2024, provided that any payment to a blocked person must be made into a blocked account in accordance with the Russian Harmful Foreign Activities Sanctions Regulations (RuHSR):

(1) The safe docking and anchoring of any of the blocked vessels listed in paragraph (b) of this general license (''blocked vessels'') in port;

(2) The preservation of the health or safety of the crew of any of the blocked vessels; or

(3) Emergency repairs of any of the blocked vessels or environmental mitigation or protection activities relating to any of the blocked vessels.

(b) The authorization in paragraph (a) of this general license applies to the following blocked persons and vessels listed on the Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List and any entity in which any of the following persons own, directly or indirectly, individually or in the aggregate, a 50 percent or greater interest:

(1) Sterling Shipping Incorporated (registered owner of NS Champion; IMO 9299719);

(2) Streymoy Shipping Limited (registered owner of Viktor Bakaev, IMO 9610810); and

(3) HS Atlantica Limited (registered owner of HS Atlantica, IMO 9322839).

(c) This general license does not authorize:

(1) The entry into any new commercial contracts involving the property or interests in property of any blocked persons, including the blocked entities and vessels described in paragraph (b) of this general license, except as authorized by paragraph (a);

(2) The offloading of any cargo onboard any of the blocked vessels, including the offloading of crude oil or petroleum products of Russian Federation origin, except for the offloading of cargo that is ordinarily incident and necessary to address vessel emergencies authorized pursuant to paragraph (a) of this general license;

(3) Any transactions related to the sale of crude oil or petroleum products of Russian Federation origin;

(4) Any transactions prohibited by Directive 2 under E.O. 14024, *Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions;*

(5) Any transactions prohibited by Directive 4 under E.O. 14024, *Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation;* or

(6) Any transactions otherwise prohibited by the RuHSR, including transactions involving the property or interests in property of any person blocked pursuant to the RuHSR, other than transactions involving the blocked persons or vessels in paragraph (b) of this general license, unless separately authorized.

Gregory T. Gatjanis,

Associate Director, Office of Foreign Assets Control.

Dated: December 1, 2023.

Bradley T. Smith,

Director, Office of Foreign Assets Control.

[FR Doc. 2023–28670 Filed 12–27–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2023–0183

RIN 1625–AA09

Drawbridge Operation Regulation; River Rouge, Detroit, MI

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: The Coast Guard is altering the operations of all movable bridges over the River Rouge, Detroit, MI to improve communications and establish winter hours.

DATES: This rule is effective January 29, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov*. Type the docket number (USCG–2023–0183) in the ''SEARCH'' box and click ''SEARCH''. In the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary final rule, call or email Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216–902–6085, email *Lee.D.Soule@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
IGLD85 International Great Lakes Datum of 1985
LWD Low Water Datum based on IGLD85
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On May 5, 2023, the Coast Guard published an NPRM, with a request for comments, entitled ''Drawbridge Operations Regulation: River Rouge, Detroit, MI ''in the **Federal Register** (88 FR 29005), to seek comments on whether the Coast Guard should consider modifying current operating schedules of certain drawbridges over the River Rouge to improve communications and establish winter hours. The National Steel Cooperation Railroad Bridge, mile 0.40, is a single leaf bascule bridge that provides horizontal clearance of 125-feet and a vertical clearance of 6-feet in the closed and an unlimited clearance above LWD.

The West Jefferson Avenue Bridge, mile 1.10, is a double leaf bascule Bridge that provides horizontal clearance of 125-feet and a vertical clearance of 9-feet in the closed and an unlimited clearance in the open position above LWD.

The Conrail Bridge, mile 1.48, is a single leaf bascule bridge that provides horizontal clearance of 123-feet and a vertical clearance of 8-feet in the closed and an unlimited clearance in the open position above LWD and it is remotely operated.

The Norfolk Southern Railroad Bridge, mile 1.87, is a single leaf bascule Bridge that provides horizontal clearance of 125-feet and a vertical clearance of 8-feet in the closed and an unlimited clearance in the open position above LWD.

The Fort Street Bridge, mile 2.20, is a single leaf bascule Bridge that provides horizontal clearance of 118-feet and a vertical clearance of 9-feet in the closed and an unlimited clearance in the open position above LWD.

The main channel of the river was the result of Mr. Henry Ford needing to straighten the entrance of the River Rouge to accommodate deliveries of raw materials to his automotive plant. This main channel, formally known as the short cut channel, formed Zug Island at the mouth of the river. The original channel that curves around the north and west sides of Zug Island is known as the old channel and is crossed by two movable bridges.

The Delray Connecting Railroad Bridge, mile 0.34, is a single leaf bascule Bridge that provides horizontal clearance of 120-feet and a vertical clearance of 7-feet in the closed and an unlimited clearance in the open position above LWD.

The Delray Connecting Railroad Bridge, mile 0.80, is a swing Bridge that provides horizontal clearance of 102-feet and a vertical clearance of 7-feet in the closed and an unlimited clearance in the open position above LWD.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499.

Commercial mariners have expressed concern that the waterway is crooked and narrow and that to safely navigate the river, they needed to know the status of each bridge in the river prior to entering the waterway. As such, commercial mariners requested that all bridges maintain and operate a marine radio. Review by the Coast Guard of specific complaints of repeated difficulty contacting the Conrail Bridge and the Norfolk Southern Railroad Bridge by radio caused the Coast Guard to determine that these bridges must maintain and make public a phone number for mariners to communicate with the drawtenders.

The institution of winter hours for drawbridges over the River Rouge will modernize bridge operations by authorizing the bridges to operate with a 12-hour advance notice during winter months, as is the practice for drawbridges on similar waterways throughout the Great Lakes.

IV. Discussion of Comments

The Coast Guard provided a comment period of 60 days, and no comments were received.

IV. Discussion of Final Rule

Commercial mariners have complained the waterway is crooked and narrow and they needed to know the status of each bridge in the river prior to entering the waterway. Requiring all bridges to maintain and operate a marine radio will facilitate this need. Furthermore, the complaints of difficulty contacting the Conrail Bridge, mile 1.48 and the Norfolk Southern Railroad Bridges by radio the Coast Guard has determined that these bridges make public a phone number for mariners to communicate with the drawtenders.

Awarding winter hours to the River Rouge has been over looked and will be established in the regulation authorizing the bridges to operate with a 12-hour advance notice from January 1 through March 31 when the river is normally frozen and impassable by most vessels.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive Orders.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, it has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability that vessels can still transit the bridge given advanced notice.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard did not receive any comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section V. A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Government

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

We did not receive any comments during the NPRM.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal Government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series) which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). The Coast Guard has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule promulgates the operating regulations or procedures for drawbridges and is categorically excluded from further review, under paragraph L49, of Chapter 3, Table3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No. 01.3.

■ 2. Amend § 117.645 River Rouge by revising paragraph (d) and adding paragraphs (e) through (h) to read as follows:

* * * * *

(d) The draw of the West Jefferson Avenue Bridge, mile 1.10, is required to operate a radiotelephone, and shall open on signal except from January 1 through March 31 when the bridge shall open on signal if provided a 12-hour advance notice.

(e) The draw of the Conrail Bridge, mile 1.48, is remotely operated, is required to operate a radiotelephone and telephone, and shall open on signal except from January 1 through March 31 when the bridge shall open on signal if provided a 12-hour advance notice.

(f) The draw of the Norfolk Southern Railroad Bridge, mile 1.87, is required to operate a radiotelephone and telephone, and shall open on signal except from January 1 through March 31 when the bridge shall open on signal if provided a 12-hour advance notice.

(g) The draw of the Fort Street Bridge, mile 2.20, is required to operate a radiotelephone, and shall open on signal except from January 1 through March 31 when the bridge shall open on signal if provided a 12-hour advance notice.

(h) The draw of the Dix Avenue Bridge, mile 2.73, is remotely operated, is required to operate a radiotelephone, and shall open on signal except from January 1 through March 31 when the bridge shall open on signal if provided a 12-hour advance notice.

Jonathan Hickey,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.

[FR Doc. 2023–28645 Filed 12–27–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0986]

RIN 1625–AA00

Safety Zone; Erie Canal, North Tonawanda, NY

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters within a 105-foot radius of a pedestrian bridge and the surrounding Erie Canal in North Tonawanda, NY. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by a fireworks display. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Eastern Great Lakes.

DATES: This rule is effective from 11:40 p.m. December 31, 2023, through 12:30 a.m. January 1, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0986 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email LT William Kelley, Waterways Management at Sector Eastern Great Lakes, U.S. Coast Guard; telephone 716–843–9343, email *D09-SMB-SECBuffalo-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the event sponsor did not submit notice of the fireworks display to the Coast Guard with sufficient time remaining before the event to publish an NPRM. Delaying the effective date of this rule to wait for a comment period to run would be impracticable and contrary to the public interest by inhibiting the Coast Guard's ability to protect spectators and vessels from the hazards associated with this fireworks display.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30-day notice period to run would be impracticable and contrary to the public interest.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port (COTP) Eastern Great Lakes has determined that fireworks over the water presents significant risks to public safety and property. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the fireworks display is taking place.

IV. Discussion of the Rule

This rule establishes a safety zone from 11:40 p.m. December 31, 2023, through 12:30 a.m. on January 1, 2024. The safety zone will cover all navigable waters within a 105-foot radius of land launched fireworks over the Erie Canal, in North Tonawanda, NY. The duration of the zone is intended to protect spectators, vessels, and the marine environment in these navigable waters during the fireworks display. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP Eastern Great Lakes or a designated representative.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. The safety zone will encompass a 105-foot radius of land launched fireworks in the Erie Canal, in North Tonawanda, NY. lasting approximately one hour during the evening when vessel traffic is normally low. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal Government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting only 50 minutes that will prohibit entry within 105 feet of the fireworks launch site. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T09–0986 to read as follows:

§ 165.T09–0986 Safety Zone; Erie Canal, North Tonawanda, NY.

(a) *Location.* The following area is a safety zone: All waters of the Erie Canal, from surface to bottom, encompassed by a 105-foot radius around 43°01′17.96″ N 78°52′41.04″ W.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Eastern Great Lakes (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the COTP Eastern Great Lakes or a designated representative.

(2) Vessel operators desiring to enter or operate within the safety zone must contact the COTP Eastern Great Lakes or their designated representative to obtain permission to do so. The COTP Eastern Great Lakes or their designated representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP Eastern Great Lakes, or their designated representative.

(d) *Enforcement period.* The regulated area described in paragraph (a) is effective from 11:40 p.m. on December 31, 2023 to 12:30 a.m. on January 1, 2024.

Dated: December 19, 2023.

M.I. Kuperman,

Captain, U.S. Coast Guard, Captain of the Port Eastern Great Lakes.

[FR Doc. 2023–28650 Filed 12–27–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0984]

Safety Zone; Marina del Rey, California

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone for a recurring firework event taking place December 31, 2023, in the Los Angeles-Long Beach Captain of the Port Zone. This action is necessary and intended to provide for the safety of life and property on navigable waterways during these events. During the enforcement period, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander or any official patrol vessels displaying a Coast Guard ensign.

DATES: The regulations in 33 CFR 165.1125 will be enforced for the location identified in table 1 to § 165.1125 item 15 from 8 p.m. on December 31, 2023, through 1 a.m. on January 1, 2024.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, contact LCDR Kevin Kinsella, U.S. Coast Guard Sector Los Angeles—Long Beach by telephone (310) 467–2099 or email *D11-SMB-SectorLALB-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce a safety zone in 33 CFR 165.1125, Table 1 to § 165.1125, item 15, for New Year's Eve Fireworks, Los Angeles County, from 8 p.m. on December 31, 2023, to 1 a.m. on January 1, 2024. This action is being taken to provide for the safety of life on navigable waterways during this event. Our regulation for firework events within the Los Angeles Long Beach Captain of the Port zone, Table 1 to § 165.1125 item 15, specifies the location of the regulated area for the New Year's Eve Fireworks which encompasses portions of the Marina del Rey Harbor and Ballona Creek. During the enforcement periods, as reflected in § 165.1125, if you are the operator of a vessel in the regulated area you must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

The Coast Guard recently published a proposed rule (88 FR 83511, November 30, 2023) and subsequent final rule

titled ''Safety Zone; Marina Del Rey, California'' which proposed to add this event 15 to the table 1 to § 165.1125.

In addition to this notification of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via marine information broadcasts.

If the Captain of the Port Los Angeles—Long Beach determines that the safety zone need not to be enforced for the full duration stated in this notice, the Captain of the Port may use a Broadcast Notice to Mariners to reflect the change.

Dated: December 20, 2023.

R.D. Manning,

Captain, U.S. Coast Guard, Captain of the Port, Los Angeles—Long Beach.

[FR Doc. 2023–28631 Filed 12–27–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2023–0968]

Safety Zone; San Francisco New Year's Eve Fireworks; San Francisco Bay, San Francisco, CA

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone in the navigable waters of the San Francisco Bay near the San Francisco Ferry building for the San Francisco New Year's Eve Fireworks Display. The safety zone will be enforced December 31, 2023, into January 1, 2024. This action is necessary to protect personnel, vessels, and the marine environment from the dangers associated with pyrotechnics. During the enforcement period, unauthorized persons or vessels are prohibited from entering, transiting through, or remaining in the safety zone, unless authorized by the Patrol Commander (PATCOM) or other Federal, State, or local law enforcement agencies.

DATES: The regulation in 33 CFR 165.1191 will be enforced for the location described in Table 1 to § 165.1191, Item number 24, from noon on December 31, 2023, through 12:45 a.m. on January 1, 2024, or as announced via Broadcast Notice to Mariners.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Lieutenant William Harris, U.S. Coast Guard Sector San Francisco, Waterways Management Division; telephone (415) 399–7443, or email *SFWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the safety zone regulations in 33 CFR 165.1191 for the event and location listed in Table 1 to § 165.1191, Item number 24, for the San Francisco New Year's Eve Firework Display from noon on December 31, 2023, through 12:45 a.m. on January 1, 2024. The Coast Guard will enforce a 100-foot safety zone around the fireworks barge during the loading, standby, transit, and arrival of the fireworks barge from the loading location to the display location and until the start of the fireworks display. On December 31, 2023, the fireworks barge will be loaded with pyrotechnics at Pier 64, Wharf 4 in San Francisco, CA from approximately noon until approximately 6 p.m. The fireworks barge will remain on standby at the load location until their transit to the display location. From 10:45 to 11:15 p.m. on December 31, 2023, the loaded fireworks barge will transit from Pier 64, Wharf 4 to the launch site near the San Francisco Ferry Building in approximate position 37°47′45″ N, 122°23′15″ W (NAD 83), where they will remain until the conclusion of the fireworks display. At approximately 11:45 p.m. on December 31, 2023, 15-minutes prior to the fireworks display, the safety zone will expand to encompass all navigable waters, from surface to bottom, within a circle formed by connecting all points 1,000 feet out from the fireworks barge. The fireworks barge will be near the San Francisco Ferry Building in San Francisco, CA in approximate position 37°47′45″ N, 122°23′15″ W (NAD 83) as set forth in 33 CFR 165.1191, Table 1, Item number 24. The safety zone will be enforced until 12:45 a.m. on January 1, 2024, or as announced via Broadcast Notice to Mariners.

In addition to this notification in the **Federal Register**, the Coast Guard plans to provide notification of the safety zone and its enforcement period via the Local Notice to Mariners.

Under the provisions of 33 CFR 165.1191, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring within the safety zone during all applicable effective dates and times, unless authorized to do so by the PATCOM or other Official patrol, defined as a Federal, State, or local law enforcement agency on scene to assist the Coast Guard in enforcing the regulated area. Additionally, each person who receives notice of a lawful order or direction issued by the PATCOM or Official Patrol shall obey the order or direction. The PATCOM or Official Patrol may, upon request, allow the transit of commercial vessels through the regulated areas when it is safe to do so.

If the COTP determines that the regulated area need not be enforced for the full duration stated in this notice, a Broadcast Notice to Mariners may be used to grant general permission to enter the regulated area.

Dated: December 22, 2023.

Taylor Q. Lam,

Captain, U.S. Coast Guard, Captain of the Port San Francisco.

[FR Doc. 2023–28713 Filed 12–27–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0845]

RIN 1625–AA00

Safety Zone; Marina Del Rey, California

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: The Coast Guard is adding two events to the table regarding ''Southern California Annual Firework Events for the Los Angeles Long Beach Captain of the Port Zone''. The additions are temporary safety zones, one for the Marina del Rey Annual Boat Parade Fireworks Show and another for the Marina Del Rey New Year's Eve Fireworks Display. Entry into these zones is prohibited during the annual events in order to provide for the safety of the waterway users and to keep them clear of potential harmful debris within the fallout zone.

DATES: This rule is effective without actual notice December 28, 2023. For the purposes of enforcement, actual notice will be used from December 20, 2023, until December 28, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0845 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email LCDR Kevin Kinsella, U.S. Coast Guard Sector Los Angeles-Long Beach; telephone (310) 521–3861, email *D11-SMB-SectorLALB-WWM@uscg.mil*.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

On October 5, 2023, Los Angeles County notified the Coast Guard that it will be conducting its annual boat parade firework display during the second weekend in December, as well as its New Year's Eve fireworks display on December 31st each year. In both events, the fireworks will be launched from Marina del Rey's South Jetty that runs between Ballona Creek and the entrance to Marina del Rey, CA. In response, on November 30, 2023, the Coast Guard published a notice of proposed rulemaking (NPRM) titled ''Safety Zone; Marina Del Rey, California'' (88 FR 83511). There we stated why we issued the NPRM and invited comments on our proposed regulatory action related to this fireworks display. During the comment period that ended December 15, 2023, we received 2 supportive comments.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to ensure potential hazards associated with the fireworks are not a safety concern for anyone within a 1000-foot radius of the pyrotechnics platform during the annual December New Year's events.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Los Angeles-Long Beach (COTP) has determined that potential hazards associated with the fireworks to be used in these annual fireworks events to be a safety concern for anyone within a 1000-foot radius of the pyrotechnics platform. The purpose of this rule is to ensure safety of vessels and the navigable waters within a 1000-foot radius of the fireworks platform before, during, and after the annual events for this year and future years.

IV. Discussion of Comments, Changes, and the Rule

As noted above, we received 2 comments in support of our NPRM published on November 30, 2023. Both commenters supported the need for the safety zone around the firework events to prevent injury and protect vessels from debris. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM.

This rule establishes two recurring safety zones that will be enforced prior, during, and after two annual firework events. The COTP is adding two events to Table 1 to 33 CFR 165.1125 for Southern California Annual Firework Events for the Los Angeles-Long Beach Captain of the Port zone. The temporary safety zones will take place annually in the Marina Del Rey Harbor Channel Entrance for approximately two hours each on the second weekend in December and on New Year's Eve, December 31st. The safety zone will cover all navigable waters within 1000 feet of the fireworks launch site on Marina del Rey's South Jetty that runs between Ballona Creek and the entrance to Marina del Rey, CA. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled annual fireworks displays. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. Vessel traffic will be able to safely transit around these safety zones before and after the fireworks displays, which will impact the entrance of Marina del Rey and Ballona Creek for a short two-hour window during the evenings when vessel traffic is normally low. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal Government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves two safety zones lasting a few hours each that will prohibit entry within 1,000 feet of a fireworks launch platform in Marina del Rey, CA. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. In § 165.1125, amend Table 1 to § 165.1125 by adding entries for items 14 and 15 to read as follows:

§ 165.1125 Southern California Annual Firework Events for the Los Angeles Long Beach Captain of the Port zone.

* * * * *

TABLE 1 TO § 165.1125

* * * * * * *	
14. Holiday Fireworks, Los Angeles County	
Sponsor	Los Angeles County, CA.
Event Description	Fireworks Display.
Date	Second weekend in December.
Location	Marina Del Ray, CA.
Regulated Area	1,000-foot radius zone around the firework display located approximately: 33°57′45″ N, 118°27′21″ W on the Marina Del Rey South Jetty.
15. New Years Eve Fireworks, Los Angeles County	
Sponsor	Los Angeles County, CA.
Event Description	Fireworks Display.
Date	December 31.
Location	Marina Del Rey, CA.
Regulated Area	1,000-foot radius zone around the firework display located approximately: 33°57′45″ N, 118°27′21″ W on the Marina Del Rey South Jetty.

Dated: December 21, 2023.

T.P. McNamara,

Commander, U.S. Coast Guard, Acting Captain of the Port, Los Angeles-Long Beach.

[FR Doc. 2023–28632 Filed 12–27–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2019–0647; FRL–10975–02–R10]

Air Plan Approval; WA; Excess Emissions, Startup, Shutdown, and Malfunction Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revisions submitted by the State of Washington, through the Department of Ecology on November 12, 2019. The revisions were submitted by Washington in response to EPA's June 12, 2015 ''SIP call'' in which EPA found a substantially inadequate Washington SIP provision providing affirmative defenses that operate to limit the jurisdiction of the Federal court in an enforcement action related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA's approval of the SIP revisions removes the substantially inadequate provision which corrects the deficiency identified in the 2015 SSM SIP call. Washington withdrew some portions of the revisions submitted that were not identified in the 2015 SSM SIP call and therefore EPA is not taking final action on those withdrawn portions.

DATES: This final rule is effective January 29, 2024.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2019–0647. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at *https://www.regulations.gov,* or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Randall Ruddick, EPA Region 10, 1200 Sixth Avenue (Suite 155), Seattle WA, 98101, (206) 553–1999, *ruddick.randall@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we'' or ''our'' is used, it means the EPA.

Table of Contents

I. Background

On June 15, 2023 (88 FR 39210), EPA proposed to approve several SIP revisions submitted by the State of Washington, through the Washington State Department of Ecology on November 12, 2019. In that proposal, we also proposed to determine that one of the SIP revisions, the removal of WAC 173–400–107, corrects the deficiency with respect to Washington that we identified in our June 12, 2015 action entitled ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction'' (''2015 SSM SIP call'') (80 FR 33839, June 12, 2015).[1] The remaining SIP revisions submitted with the request to remove WAC 173–400–107 on November 12, 2019, were not subject to the 2015 SSM SIP call. The reasons for our proposed approval and determination can be found in the proposed action and will not be fully restated here (88 FR 39210, June 15, 2023).

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period which ended on July 17, 2023. We received one set of comments from the public signed by representatives of the Sierra Club and Environmental Integrity Project. The full text of the comments is available in the docket for this rulemaking. Issues raised in the comments, and our responses are summarized below.

[1] The term ''SIP call'' refers to the requirement for a revised SIP in response to a finding by the EPA that a SIP is ''substantially inadequate'' to meet CAA requirements pursuant to CAA section 110(k)(5), titled ''Calls for plan revisions.''

A. Removal of WAC 173–400–107

WAC 173–400–107 was the only provision identified as deficient for Washington State Department of Ecology in the 2015 SSM SIP call. The commenters agreed that removal of WAC 173–400–107 from the SIP would satisfy the 2015 SSM SIP call. EPA acknowledges the commenter's support and is finalizing the removal of WAC 173–400–107 in this action. As stated in our proposed approval (88 FR 39210, June 15, 2023), EPA's removal of the provision providing for an affirmative defense corrects the deficiency identified in our 2015 SSM SIP call regarding the Washington State Department of Ecology. The remaining SIP revisions submitted with the request to remove WAC 173–400–107 on November 12, 2019, were not subject to the 2015 SSM SIP call.

B. WAC 173–400–040, General Standards for Maximum Emissions

The commenters ''generally agree that Washington's proposal is generally an improvement over the current SSM exemptions'' but also raised several concerns regarding the revisions to WAC 173–400–040 that we proposed to approve. On December 12, 2023, the State withdrew those revisions from its November 12, 2019, submittal via letter to EPA.[2] Accordingly, EPA is not taking final action on those revisions and therefore is not responding to the portions of the comment regarding WAC 173–400–040 in this action.

Washington also withdrew three analogs to WAC 173–400–040, specifically: WAC 173–405–040(6)(b), WAC 173–410–040(3)(b), and WAC 173–415–030(3)(b). Accordingly, EPA is not finalizing the proposed approval of these withdrawn provisions. Should these or other revisions be submitted to EPA for approval, EPA will publish an additional proposed rule and provide an opportunity for public comment prior to taking any final action on them.

The 2015 SSM SIP call did not obligate Washington to make or submit any revisions other than removing WAC 173–400–040. Accordingly, approval of the remaining revisions as well as the withdrawal of some of them do not affect the disposition of Washington's obligation under the 2015 SSM SIP call. As stated above and in our proposed approval, the portion of the November 12, 2019, removing WAC 173–400–107

[2] See *104_state submittal_Withdrawal Letter 12–14–2023.pdf* which is included in the docket for this action.

from the SIP and the State regulations is fully responsive to the 2015 SSM SIP call and no further action is required to satisfy the 2015 SSM SIP call.

C. WAC 173–400–081, Emission Limits During Startup and Shutdown

Comment. The commenters claim that this provision does not comport with ''[t]he first criterion of EPA's seven for approving AELs [alternative emission limitations]'' as it is not ''limited to specific, narrowly defined source categories using specific control strategies.'' [3] The commenters assert ''[s]ource-specific alternative emission limitations, generally, are not proper.'' The commenters also assert ''the source-by-source approach that Washington is taking here 'could lead to inconsistent alternative limits for sources that should probably have similar alternative limits for startup or shutdown,''' citing a **Federal Register** notice in which EPA proposed disapproval of AELs submitted for approval into the West Virginia SIP.[4] The commenters also assert that ''a source-by-source approach makes it difficult to consider the cumulative impact of all the source-specific emission limitations on air quality.''

Response. As stated in the 2015 SSM SIP call, EPA believes there will be limited cases where it may be necessary to develop source-specific emission requirements for startup and or shutdown. WAC 173–400–081 merely establishes a pathway for such limited cases as may be necessary. Any source-specific emission limits developed pursuant to this provision must go through the SIP approval process and any comments on actual emissions limits could be raised during those individual rulemaking actions. Therefore, EPA believes the commenters' concerns are premature regarding whether any future AELs submitted through this process would meet the recommended criteria in the 2015 SSM SIP call. Moreover, EPA has acknowledged that source-specific AELs could be appropriate in some limited circumstances, so we disagree that merely establishing a pathway for developing such AELs and revising the SIP accordingly is inconsistent with the 2015 SSM SIP Call.

We also disagree that EPA's prior disapproval of West Virginia's AELs, as referenced by the commenters, supports disapproval here. EPA disapproved West Virginia's submittal primarily because the provisions at issue would have provided the State with discretion to create source-specific AELs without submitting those AELs to EPA for approval into the SIP. EPA further identified the concern that West Virginia's AEL process ''could lead to inconsistent alternative limits for sources that should probably have similar alternative limits for startup and shutdown.'' [5] However, in light of the fact that the SIP revision process for the AELs created pursuant to WAC 173–400–081 allows both EPA and any concerned members of the public an opportunity to identify any alleged inconsistencies, those concerns are not applicable here. For the aforementioned reasons and those stated in our proposed approval, EPA is finalizing approval of this provision.

IV. Final Action

EPA is approving and incorporating by reference in the Washington SIP at 40 CFR 52.2470(c) revisions to WAC 173–400–030, 173–400–070, 173–400–081, and 173–400–171 (State effective 9/16/2018); revisions to 173–405–040, 173–410–040, and 173–415–030 (State effective 5/24/2018); the addition of WAC 173–400–082 (State effective 9/16/2018); and the removal of 173–405–077, 173–410–067, and 173–415–070. This approval is consistent with the exceptions requested by the State in the November 5, 2019, submittal as described in the proposal for this action and set forth in the amendments to 40 CFR part 52 below. This approval is also consistent with the State's withdrawal of certain revisions as described in the State's December 14, 2023, letter. In addition, this action removes provision WAC 173–400–107—identified as inconsistent with CAA requirements—from the Washington SIP thereby correcting the deficiency identified in our 2015 SSM SIP call with respect to Washington State Department of Ecology.

Once this approval becomes effective, changes to WAC 173–400 will apply specifically to the jurisdictions of Washington Department of Ecology and Benton Clean Air Agency. Under the applicability provisions of WAC 173–405–012, WAC 173–410–012, and WAC 173–415–012, BCAA does not have jurisdiction for kraft pulp mills, sulfite pulping mills, and primary aluminum plants. For these sources, Washington Department of Ecology retains statewide, direct jurisdiction over these sources.

Once this approval becomes effective, the Washington SIP will include the following regulations:

- WAC 173–400–030, Definitions (State effective 9/16/2018)—Establishes definitions used throughout Chapter 173–400 WAC;
- WAC 173–400–070, Emission Standards for Certain Source Categories (State effective 9/16/2018)—sets forth maximum allowable standards for emissions units within the categories listed;
- WAC 173–400–081, Emission Limits during Startup and Shutdown (State effective 9/16/2018)—establishes pathway for developing emissions limits that apply during startup and shutdown;
- WAC 173–400–082, Alternative Emission Limit That Exceeds an Emission Standard in the SIP (State effective 9/16/2018)—establishes pathway for an owner or operator to request an alternative emissions limit;
- WAC 173–400–171 Public Involvement (State effective 9/16/2018)—sets forth certain requirements for public involvement;
- WAC 173–405–040, Emission Standards (State effective 5/24/2018)—sets forth certain emission standards for kraft pulping mills;
- WAC 173–410–040, Emission Standards (State effective 5/24/2018)—sets forth certain emission standards for sulfite pulping mills;
- WAC 173–415–030, Emission Standards (State effective 5/24/2018)—sets forth certain emission standards for primary aluminum plants.

Once this approval becomes effective, the Washington SIP will no longer include the following regulations:

- WAC 173–400–107, Excess Emissions—established a pathway to determine excess emissions unavoidable, excuse them from penalty, and certain instances preclude them from being considered violations;
- WAC 173–405–077, Report of Startup, Shutdown, Breakdown or Upset Conditions—established applicability of WAC 173–400–107 for kraft pulping mills;
- WAC 173–410–067, Report of Startup, Shutdown, Breakdown or Upset Conditions—established applicability of WAC 173–400–107 for sulfite pulping mills;
- WAC 173–415–070, Report of Startup, Shutdown, Breakdown or Upset Conditions—established applicability of WAC 173–400–107 for primary aluminum plants.

VI. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of regulatory provisions

[3] 2015 SSM SIP call, 80 FR 33840, June 12, 2015.

[4] See 87 FR 78617, December 22, 2022.

[5] See 87 FR 78620, December 22, 2022.

described in section II of this preamble and set forth in the amendments to 40 CFR part 52 in this document. The EPA has made, and will continue to make, these materials generally available through *https://www.regulations.gov* and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the Clean Air Act as of the effective date of the final rule of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[6]

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the Clean Air Act and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of this action, it is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

In addition, the SIP is not approved to apply on any Indian reservation land in Washington except as specifically noted below and is also not approved to apply in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law. Washington's SIP is approved to apply on non-trust land within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided State and local agencies in Washington authority over activities on non-trust lands within the 1873 Survey Area. Consistent with EPA policy, the EPA provided a consultation opportunity to potentially affected tribes in a letter dated May 24, 2022.

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 26, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 18, 2023.

Casey Sixkiller,

Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart WW—Washington

■ 2. In § 52.2470:
■ a. Amend paragraph (c), table 1 by:
■ i. Revising entries ''173–405–040'' and ''173–410–040'';
■ ii. Removing entries ''173–405–077'' and ''173–410–067'';

[6] 62 FR 27968 (May 22, 1997).

■ iii. Revising entry ''173–415–030''; and
■ iv. Removing entry ''173–415–070''.
■ b. Amend paragraph (c), table 2 by:
■ i. Revising entry ''173–400–030'';
■ ii. Removing entry ''173–400–030 (30) and (36)'';
■ iii. Revising entries ''173–400–070'' and ''173–400–081'';
■ iv. Adding entry ''173–400–082'' in numerical order;
■ v. Removing entry ''173–400–107''; and
■ vi. Revising entry ''173–400–171''; and
■ c. Amend paragraph (c), table 4 by:
■ i. Revising entry ''173–400–030'';
■ ii. Removing entry ''173–400–030 (30) and (36)'';
■ iii. Revising entries ''173–400–070'' and ''173–400–081'';
■ iv. Adding entry ''173–400–082'' in numerical order;
■ v. Removing entry ''173–400–107''; and
■ vi. Revising entry ''173–400–171''.

The revisions and additions read as follows:

§ 52.2470 Identification of plan.

* * * * *

(c) * * *

TABLE 1—REGULATIONS APPROVED STATEWIDE

[Not applicable in Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation) and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction.]

State citation	Title/subject	State effective date	EPA approval date	Explanations
Washington Administrative Code, Chapter 173–405—Kraft Pulping Mills				
*	*	*	*	*
173–405–040	Emissions Standards	5/24/19	12/28/2023, [Insert **Federal Register** citation].	Except: 173–405–040(1)(b); 173–405–040(1)(c); 173–405–040(3)(b); 173–405–040(3)(c); 173–405–040(4); 173–405–040(6)(b).
*	*	*	*	*
Washington Administrative Code, Chapter 173–410—Sulfite Pulping Mills				
173–410–040	Emissions Standards	5/24/19	12/28/2023, [Insert **Federal Register** citation].	Except: 173–410–040(3)(b); 173–410–040(5).
*	*	*	*	*
Washington Administrative Code, Chapter 173–415—Primary Aluminum Plants				
173–415–030	Emissions Standards	5/24/19	12/28/2023, [Insert **Federal Register** citation].	Except: 173–410–030(1); 173–410–030(3)(b).
*	*	*	*	*

* * * * *

TABLE 2—ADDITIONAL REGULATIONS APPROVED FOR WASHINGTON DEPARTMENT OF ECOLOGY (ECOLOGY) DIRECT JURISDICTION

[Applicable in Adams, Asotin, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, San Juan, Stevens, Walla Walla, and Whitman counties, excluding facilities subject to Energy Facilities Site Evaluation Council (EFSEC) jurisdiction, Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation), and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. These regulations also apply statewide for facilities subject to the applicability sections of WAC 173–400–700, 173–405–012, 173–410–012, and 173–415–012.]

State citation	Title/subject	State effective date	EPA approval date	Explanations
Washington Administrative Code, Chapter 173–400—General Regulations for Air Pollution Sources				
*	*	*	*	*
173–400–030	Definitions	9/16/18	12/28/2023, [Insert **Federal Register** citation].	Except: 173–400–030(96).
*	*	*	*	*
173–400–070	Emission Standards for Certain Source Categories.	9/16/18	12/28/2023, [Insert **Federal Register** citation].	Except: 173–400–070(5); 173–400–070(6).
*	*	*	*	*
173–400–081	Emissions Limits During Startup and Shutdown.	9/16/18	12/28/2023, [Insert **Federal Register** citation].	

TABLE 2—ADDITIONAL REGULATIONS APPROVED FOR WASHINGTON DEPARTMENT OF ECOLOGY (ECOLOGY) DIRECT JURISDICTION—Continued

[Applicable in Adams, Asotin, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, San Juan, Stevens, Walla Walla, and Whitman counties, excluding facilities subject to Energy Facilities Site Evaluation Council (EFSEC) jurisdiction, Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation), and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. These regulations also apply statewide for facilities subject to the applicability sections of WAC 173–400–700, 173–405–012, 173–410–012, and 173–415–012.]

State citation	Title/subject	State effective date	EPA approval date	Explanations
173–400–082	Alternative Emissions Limit That Exceeds an Emission Standard in the SIP.	9/16/18	12/28/2023, [Insert **Federal Register** citation].	
*	*	*	*	*
173–400–171	Public Notice and Opportunity for Public Comment.	9/16/18	12/28/2023, [Insert **Federal Register** citation].	Except: The part of 173–400–171(3)(b) that says, • "or any increase in emissions of a toxic air pollutant above the acceptable source impact level for that toxic air pollutant as regulated under chapter 173–460 WAC"; 173–400–171(12).
*	*	*	*	*

* * * * *

TABLE 4—ADDITIONAL REGULATIONS APPROVED FOR THE BENTON CLEAN AIR AGENCY (BCAA) JURISDICTION

[Applicable in Benton County, excluding facilities subject to Energy Facilities Site Evaluation Council (EFSEC) jurisdiction, Indian reservations and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and facilities subject to the applicability sections of WAC 173–400–700, 173–405–012, 173–410–012, and 173–415–012.]

State/local citation	Title/subject	State/local effective date	EPA approval date	Explanations
*	*	*	*	*
Washington Department of Ecology Regulations Washington Administrative Code, Chapter 173–400—General Regulations for Air Pollution Sources				
*	*	*	*	*
173–400–030	Definitions	9/16/18	12/28/2023, [Insert **Federal Register** citation].	Except: 173–400–030(40); 173–400–030(41); 173–400–030(96).
*	*	*	*	*
173–400–070	Emission Standards for General Process Units.	9/16/18	12/28/2023, [Insert **Federal Register** citation].	Except: 173–400–070(5); 173–400–070(6).
*	*	*	*	*
173–400–081	Emissions Limits During Startup and Shutdown.	9/16/18	12/28/2023, [Insert **Federal Register** citation].	
173–400–082	Alternative Emissions Limit That Exceeds an Emission Standard in the SIP.	9/16/18	12/28/2023, [Insert **Federal Register** citation].	
*	*	*	*	*
173–400–171	Public Notice and Opportunity for Public Comment.	9/16/18	12/28/2023, [Insert **Federal Register** citation].	Except: The part of 173–400–171(3)(b) that says, • "or any increase in emissions of a toxic air pollutant above the acceptable source impact level for that toxic air pollutant as regulated under chapter 173–460 WAC"; 173–400–171(12).
*	*	*	*	*

* * * * *

[FR Doc. 2023–28294 Filed 12–27–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2023–0203; FRL–10757–02–R9]

Approval and Promulgation of Implementation Plans; Revisions to the California State Implementation Plan; San Francisco Bay Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action under the Clean Air Act (CAA or ''Act'') to approve a revision to the San Francisco Bay Area portion of the California State Implementation Plan (SIP). This revision consists of updated transportation conformity procedures related to the interagency coordination on project-level conformity and exchange of travel data for emissions inventories developed for air quality plans and regional transportation conformity analyses. This action updates the transportation conformity criteria and procedures in the California SIP.

DATES: This action is effective January 29, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2023–0203. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Michael Dorantes, Geographic Strategies and Modeling Section (AIR–2–2), EPA Region IX, (415) 972–3934, *dorantes.michael@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA.

Table of Contents

I. Summary of Proposed Action

On July 27, 2023, the EPA proposed to approve a revision to the California SIP concerning transportation conformity procedures for the San Francisco Bay Area.[1] The California Air Resources Board (CARB) submitted ''The San Francisco Bay Area Transportation Air Quality Conformity Protocol—Conformity Procedures'' and ''The San Francisco Bay Area Transportation Air Quality Conformity Protocol—Interagency Consultation Procedures,'' on May 17, 2021. We refer to these documents together as the ''San Francisco Bay Area conformity SIP submittal.'' [2] CARB submitted a prior version of the San Francisco Bay Area conformity SIP to the EPA for approval on December 20, 2006. The EPA approved this SIP revision on October 12, 2007.[3] The agencies responsible for developing and updating the San Francisco Bay Area conformity SIP—the Metropolitan Transportation Commission (MTC), the Bay Area Air Quality Management District (BAAQMD), and the Association of Bay Area Governments (ABAG), in consultation with the Sacramento Area Council of Governments (SACOG)—have since further amended the roles and responsibilities for implementing the transportation conformity interagency consultation process and for coordinating travel activity data sharing. The San Francisco Bay Area conformity SIP submittal also reflects an update to a memorandum of understanding that exists between MTC and SACOG as an agreement regarding federal conformity procedures and programming of federal Congestion Mitigation and Air Quality funds in Solano County.[4]

In our proposal, we evaluated the San Francisco Bay Area conformity SIP submittal against the statutory and regulatory requirements of the CAA, 40 CFR part 93, and 40 CFR 51.390, which govern state procedures for transportation conformity and interagency consultation and concluded that the submittal meets these requirements. Furthermore, the comment period and public hearing held by MTC for this SIP revision satisfy the requirements of CAA section 110(l) and 40 CFR 51.102. A technical support document (TSD) is included in the docket for this rulemaking. Specifically, in our TSD, we identify how the submitted procedures satisfy requirements under 40 CFR 93.105 for interagency consultation with respect to the development of transportation plans and programs, SIPs, conformity determinations, the resolution of conflicts, the provision of adequate public consultation, and our requirements under 40 CFR 93.122(a)(4)(ii) and 93.125(c) for enforceability of control measures and mitigation measures. Please refer to our TSD and notice of proposed rulemaking for additional information regarding the content of the revised San Francisco Bay conformity SIP submittal and our review.

II. Public Comments and EPA Responses

The 30-day public comment period for the notice of proposed rulemaking closed on August 28, 2023. During this period, a member of the public submitted two identical comments to the EPA in support of the proposed approval. The full text of these comments is available for viewing in the docket for this rulemaking.

III. EPA Action

In accordance with section 110(k)(3) of the Act, and for the reasons discussed in our proposed rulemaking and summarized in this document, we are finalizing our approval of the San Francisco Bay Area conformity SIP submittal as a revision to the California SIP. The revision will be incorporated

[1] 88 FR 48406 (July 27, 2023).

[2] In addition to other supporting documents, the submittal package included the following documents: ''San Francisco Bay Area Transportation Air Quality Conformity Protocol,'' Revised: February 26, 2020; ''Amended and Restated Memorandum of Understanding Between the Metropolitan Transportation Commission and the Sacramento Area Council of Governments,'' (September 11, 2018); and a letter dated May 6, 2021, (submitted electronically May 17, 2021), from Richard W. Corey, Executive Officer, CARB, to Deborah Jordan, Acting Regional Administrator, EPA Region IX, Subject: San Francisco Bay Area State Implementation Plan Amended Transportation Air Quality Conformity Protocol. These documents are available in the docket for this rulemaking.

[3] 72 FR 58013 (October 12, 2007).

[4] See ''Metropolitan Transportation Commission Resolution No. 2611. Revised, MTC/Sacramento Area Council of Governments (SACOG) Memorandum of Understanding (MOU) for Air Quality Planning in Eastern Solano County'' and Metropolitan Transportation Commission Resolution No. 3757, ''Re: Approval of San Francisco Bay Area Transportation Air Quality Conformity Protocol,'' which is included in the docket for this rulemaking.

into the San Francisco Bay Area portion of the California SIP and thereby replace the previous revision approved on October 12, 2007.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, this rulemaking does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The State did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. If finalized, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 26, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate Matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 20, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

For the reasons stated in the preamble, the Environmental Protection Agency amends part 52, chapter I, title 40 of the Code of Federal Regulations as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(349)(i)(A)(*2*) and (c)(608) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(349) * * *

(i) * * *

(A) * * *

(*2*) Previously approved on October 12, 2007, in paragraph (c)(349)(i)(A)(*1*) of this section and now deleted with replacement in paragraph (c)(608)(i)(A)(*1*) of this section: the San Francisco Bay Area Transportation Air Quality Conformity Protocol—Conformity Procedures (July 26, 2006) and San Francisco Bay Area Transportation Air Quality Conformity Protocol—Interagency Consultation Procedures (July 26, 2006), adopted by BAAQMD on July 19, 2006, by ABAG on July 20, 2006, and by MTC on July 26, 2006.

* * * * *

(608) San Francisco Bay Area Transportation Air Quality Conformity Protocol—Conformity Procedures and Interagency Consultation Procedures was submitted electronically on May 17, 2021, by the Governor's designee as an attachment to a letter dated May 6, 2021.

(i) [Reserved]

(ii) *Additional materials.* (A) Association of Bay Area Governments (ABAG), Bay Area Air Quality Management District (BAAQMD), and Metropolitan Transportation Commission (MTC).

(*1*) The San Francisco Bay Area Transportation Air Quality Conformity

Protocol—Conformity Procedures (February 26, 2020) and San Francisco Bay Area Transportation Air Quality Conformity Protocol—Interagency Consultation Procedures (February 26, 2020), adopted by MTC on February 26, 2020, BAAQMD on March 4, 2020, and by ABAG on April 23, 2020.

(*2*) [Reserved]

(B) [Reserved]

* * * * *

[FR Doc. 2023–28494 Filed 12–27–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2023–0090; FRL–11014–02–R6]

Air Plan Approval; Oklahoma; Revisions to Air Pollution Control Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving revisions to the State Implementation Plan (SIP) for Oklahoma, submitted to the EPA by the State of Oklahoma designee (''the State'') on January 30, 2023. The SIP revisions being approved address amendments to subchapters regarding Control of Emission of Volatile Organic Compounds (VOCs) and Emission of Volatile Organic Compounds (VOCs) in Nonattainment Areas and Former Nonattainment Areas.

DATES: This rule is effective on January 29, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID EPA–R06–OAR–2023–0090. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Emad Shahin, EPA Region 6 Office, Infrastructure and Ozone Section, 214–665–6717, *shahin.emad@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' means the EPA.

I. Background

The background for this action is discussed in detail in our June 13, 2023, proposal (88 FR 38433).[1] In that document we proposed to approve a portion of the revisions to the Oklahoma SIP submitted on January 30, 2023. Our June 2023 proposal addressed only the portion of the submittal that referred to the Oklahoma Administrative Code (OAC) Title 252, Chapter 100 (denoted OAC 252:100), Subchapters 37, and 39. The remainder of the submitted revisions were addressed in a separate rulemaking action.[2]

The revisions addressed in our June 2023 proposal add clarity and consistency to the Oklahoma SIP. The revisions do not relax the current SIP rules and are consistent with applicable Federal regulations. Therefore, and consistent with CAA section 110(l), we do not expect these revisions to interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Act. More detail on these revisions is provided in the docket for this action.

Our June 2023 proposal provided a detailed description of the revisions and the rationale for the EPA's proposed actions, together with a discussion of the opportunity to comment. The public comment period for our June 2023 proposal was extended to August 14, 2023, to allow additional time for stakeholders to review and comment on the proposal.

We received comments from the Muscogee (Creek) Nation, the Chickasaw Nation, and two anonymous comments. One anonymous comment supported the extension of the comment period and the other was supportive of this action generally. Below are our responses to comments from the Muscogee (Creek) Nation and the Chickasaw Nation.

II. Response to Comments

Comment: During Tribal Consultation, the Muscogee (Creek) Nation asked for more information regarding the number of compressor station facilities within the Muscogee Reservation.

Response: Region 6 was able to obtain the number of natural gas compressor stations within the Muscogee (Creek) Nation Reservation from the ODEQ emission inventory database. There are 79 compressor stations in the counties that make up the reservation.

Comment: Commenter stated concern about the number of compressor stations (and therefore the amount of loading at relevant condensate tanks) on Muscogee (Creek) Reservation land, the amount of VOC's, and the effects that the VOC's may have on Muscogee citizens' health and the environment.

Response: EPA agrees that VOC emissions can be harmful to human health and the environment but notes that this action will not result in any increase in emissions of VOCs. EPA has found this revision complies with Clean Air Act Requirements. EPA is required to approve SIP revisions that comply with all applicable requirements.

This action merely clarifies ODEQ's long standing interpretation that the provisions of Subchapter 37 do not apply to loading operations at condensate tanks at compressor stations. As this is just a clarification, there is no change to how these facilities are regulated in practice and there is no increase in emissions of VOC's. This type of loading, however, remains regulated under separate provisions specific to compressor station operations.

A loading facility has the main purpose of loading/unloading VOC's in relatively large quantities using specialized equipment. Although condensate loading operations occur at compressor stations, that is not its main purpose. The transfer of condensate and produced water from atmospheric storage tanks into individual tanker trucks at a compressor station is a different type of operation both in scale and in the equipment used than is the case in, for example, the bulk transfer of gasoline at a pipeline terminal/bulk gasoline distribution system. Condensate loading operations at compressor stations were not meant to be covered by 252:100–37–16 as they do not have the physical equipment (loading arm and pump) to conduct this type of loading and have much lower throughput and emissions. The loading of condensate from natural gas compressor station is regulated under other ODEQ rules such as 252:100–37–15(b) for submerged fill or a vapor recovery system which applies to most condensate tanks at compressor stations since a typical tank is about 400 barrels (16,800 gallons). Also, natural gas compressor stations are subject to federal New Source Performance Standards (NSPS) such as Subpart OOOO.

[1] Henceforth referred to as our ''June 2023'' proposal.

[2] The submitted revisions also address amendments to Subchapter 2, and Appendix Q, Incorporation by Reference, and Subchapter 8, Permits for Part 70 Sources and Major New Source Review (NSR) Sources, in the Oklahoma Administrative Code Title 252, Chapter 100, Oklahoma Department of Environmental Quality. More information about the EPA addressing these other sections may be found in the text of the June 2023 proposed action.

Comment: Commenter stated concern that incineration of petroleum solvents as in dry cleaning filters is not an acceptable process in Indian Country and that the incineration of petroleum solvents creates Hazardous Air Pollutants that cause health and environmental justice issues. The commenter also stated that the outdated compliance schedule should be replaced with an updated one.

Response: Based on its air quality inspections in Tulsa County, the ODEQ is not aware of any facilities that incinerate dry cleaning filters as referenced in this subchapter. In addition, the revision only clarifies that if a facility were to incinerate the filters, it can only be allowed if permitted by the appropriate regulatory entity. It is important to note that this section of the ODEQ rules does not set requirements that must be met to obtain a permit for incineration only that there be the appropriate permit which would be the case even if this provision was not included in the SIP. As such, the revision does not impact compliance with the Clean Air Act and therefore, EPA must approve the revision.

The revision also removes the outdated compliance schedule of October 1, 1986. There is no need to replace this schedule as there is not a grace period for facilities to get into compliance; existing facilities should be complying already, and new facilities would need to begin operations in compliance with this subchapter.

Comment: The commenter stated that there appears to be no environmental justice issue, but the Muscogee (Creek) Nation would like to see the EJ report and the reporting decision on the subject matter.

Response: Please see ''EJ Considerations'' document, Doc. ID 0005 in the docket for this action for review of Environmental Justice information related to this action.

Comment: In their comment, the Chickasaw Nation provides some background on SAFETEA and the *McGirt* v. *Oklahoma* litigation. This includes the most current status that while EPA proposed the withdrawal and reconsideration of the October 1, 2020, decision to grant Oklahoma authorization to administer EPA approved environmental programs in Indian Country, the October 2020 decision remains in effect until EPA takes final action. The Chickasaw Nation comments that the EPA's action on the Oklahoma SIP is premature and the agency should first resolve the issue of the withdrawal before proceeding with new regulatory actions under SAFETEA. The commenter recommends that no new actions that impact Indian country should be taken until a final decision is made on the October 2020 approval. The Chickasaw Nation also comments regarding the importance of EPA's federal trust obligations to Indian tribes including government-to-government consultations and asks that EPA be more proactive in its fulfillment of federal trust responsibilities.

Response: As stated in our June 2023 proposal, and by the commenter, the State retains its authority to administer authorized programs in certain areas of Indian country pursuant to the October 1, 2020, approval under SAFETEA while EPA undergoes its reconsideration of that decision. The State's authority includes the implementation the SIP in areas of Indian country included in the October 2020 approval and in non-reservation areas of Indian country pursuant to *ODEQ v EPA.* As also noted in the June 2023 proposal, EPA may make further changes to this final approval of Oklahoma's program to reflect the outcome of the proposed withdrawal and reconsideration of the October 1, 2020, SAFETEA approval. EPA notes that the litigation involving the October 2020 decision is currently being held in abeyance pending the outcome of EPA's reconsideration. EPA takes seriously its general federal trust responsibility to tribes. By example, EPA has engaged with and offered consultation to all affected Oklahoma tribes on this matter. EPA intends to continue its engagement with tribes on relevant matters, including on actions related to approvals in Oklahoma and with regards to SAFETEA.

III. Final Action

We are approving portions of a SIP revision submitted to the EPA by the State of Oklahoma on January 30, 2023. Specifically, we are approving the revisions to OAC 252:100, Subchapters 37 (Control of Emission of Volatile Organic Compounds (VOCs), and 39 (Emission of Volatile Organic Compounds (VOCs) in Nonattainment Areas and Former Nonattainment Areas). We are approving these revisions in accordance with section 110 of the Act.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference the revisions to the Oklahoma regulations as described in Section III of this preamble, Final Action. The revised regulations address VOC emissions. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated in the next update to the SIP compilation.

V. Impact on Areas of Indian Country

As stated in the proposed action, on October 1, 2020, the EPA approved Oklahoma's request to administer all the State's EPA-approved environmental regulatory programs, including the Oklahoma SIP, in the requested areas of Indian country pursuant to section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users, Public Law 109–59, 119 Stat. 1144, 1937 (August 10, 2005) (''SAFETEA'').[3]

As requested by Oklahoma, the EPA's approval under SAFETEA does not include Indian country lands, including rights-of-way running through the same, that: (1) qualify as Indian allotments, the Indian titles to which have not been extinguished, under 18 U.S.C. 1151(c); (2) are held in trust by the United States on behalf of an individual Indian or Tribe; or (3) are owned in fee by a Tribe, if the Tribe (a) acquired that fee title to such land, or an area that included such land, in accordance with a treaty with the United States to which such Tribe was a party, and (b) never allotted the land to a member or citizen of the Tribe (collectively ''excluded Indian country lands''). In addition, the State only sought approval to the extent that such approval is necessary for the State to administer a program in light of *Oklahoma Dept. of Environmental Quality* v. *EPA,* 740 F.3d 185 (D.C. Cir. 2014).

As explained earlier in this action, the EPA is approving revisions to portions of the Oklahoma SIP that were submitted by the State of Oklahoma on January 24, 2023. More specifically, we are approving a revision providing clarification to OAC 252:100–37–16 of Subchapter 37, Control of Emission of Volatile Organic Compounds (VOCs)

[3] A copy of EPA's October 1, 2020, approval can be found in the docket for this rulemaking on the *https://www.regulations.gov* website. See Document ID No. XXXXX

and amending language and correcting approval process for OAC 252:100–39–45 of Subchapter 39, Emission of Volatile Organic Compounds (VOCs) in Nonattainment Areas and Former Nonattainment Areas, in the Oklahoma Administrative Code Title 252, Chapter 100, Oklahoma Department of Environmental Quality. Consistent with the D.C. Circuit's decision in *ODEQ* v. *EPA* and with EPA's October 1, 2020, SAFETEA approval, these SIP revisions will apply to all Indian country within Oklahoma, other than the excluded Indian country lands, as described earlier. Because—per the State's request under SAFETEA—EPA's October 1, 2020, SAFETEA approval does not displace any SIP authority previously exercised by the State under the CAA as interpreted in *ODEQ* v. *EPA,* the SIP will also apply to any Indian allotments or dependent Indian communities located outside of an Indian reservation over which there has been no demonstration of tribal authority.[4]

VI. Environmental Justice Considerations

As stated in our June 2023 proposal and posted in the docket for this action, EPA reviewed demographic data, which provides an assessment of individual demographic groups of the populations living within Oklahoma. EPA then compared the data to the national average for each of the demographic groups. The results of this analysis are being provided for informational and transparency purposes. The results of the demographic analysis indicate that, for populations within Oklahoma, the percent people of color (persons who reported their race as a category other than White alone (not Hispanic or Latino)) is less than the national average (38.5 percent versus 43.1 percent). Within people of color, the percent of the population that is Black or African American alone is less than the national average (7.8 percent versus 13.6 percent) and the percent of the population that is American Indian/Alaska Native is greater than the national average (9.7 percent versus 1.3 percent). The percent of the population that is two or more races is greater than the national average (6.6 percent versus 2.9 percent). The percent of people living in poverty in Oklahoma is greater than the national average (15.6 percent versus 11.6 percent).

This final action approves new rules into the Oklahoma SIP that are anticipated to add clarification and consistency to the SIP and will generally be neutral or contribute to reduced environmental and health impacts on all populations in Oklahoma, including indigenous people, people of color, and low-income populations. There is no information in the record indicating that this action is expected to have disproportionately high or adverse human health or environmental effects on a particular group of people. EPA offered consultation on our proposed rulemaking to tribal governments that may be affected by this action.[5] We received one request for tribal consultation from the Muscogee Nation and provided such on August 10, 2023.

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the EPA offered consultation (by letter dated June 8, 2023) on our proposed rulemaking to tribal governments that may be affected by this action. We received a request for formal tribal consultation from the Muscogee Nation and provided consultation on August 10, 2023.

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a

[4] In accordance with Executive Order 13990, EPA is currently reviewing our October 1, 2020 SAFETEA approval and expects to engage in further discussions with tribal governments and the State of Oklahoma as part of this review. EPA notes that the SAFETEA approval is the subject of a pending challenge in Federal court. (*Pawnee v Regan,* No. 20–9635 (10th Cir.)). Pending completion of EPA's review, EPA is proceeding with this proposed action in accordance with the October 1, 2020, approval. Although EPA is approving these revisions before our review of the SAFETEA approval is complete, EPA may make further changes to the approval of Oklahoma's program to reflect the outcome of the proposed withdrawal and reconsideration of the October 1, 2020, SAFETEA approval.

[5] See invitation for consultation, dated June 8, 2023, in the docket for this action.

disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The Oklahoma Department of Environmental Quality did not evaluate EJ considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA performed an EJ analysis, as is described earlier in the section titled, ''Environmental Justice Considerations.'' The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of E.O. 12898 of achieving EJ for people of color, low-income populations, and Indigenous peoples.

This action is subject to the Congressional Review Act, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 26, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Volatile organic compounds.

Dated: December 19, 2023.

Earthea Nance,

Regional Administrator, Region 6.

For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart LL—Oklahoma

■ 2. In § 52.1920, the table in paragraph (c) titled ''EPA Approved Oklahoma Regulations'' is amended by revising entries for 252:100–37–16 and 252:100–39–45 to read as follows:

§ 52.1920 Identification of plan

* * * * *

(c) * * *

EPA APPROVED OKLAHOMA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
CHAPTER 100 (OAC 252:100). AIR POLLUTION CONTROL				
*	*	*	*	*
Subchapter 37. Control of Emission of Volatile Organic Compounds (VOC)				
*	*	*	*	*
PART 5. Control of VOCs in Coating Operations				
*	*	*	*	*
252:100–37–16	Loading of VOCs	9/15/2020	12/28/2023, [Insert **Federal Register** citation].	
*	*	*	*	*
Subchapter 39. Emission of Volatile Organic Compounds (VOCs) in Nonattainment Areas and Former Nonattainment Areas				
*	*	*	*	*
PART 7. Specific Operations				
*	*	*	*	*
252:100–39–45	Petroleum (solvent) dry cleaning.	9/15/2020	12/28/2023. [Insert **Federal Register** citation].	
*	*	*	*	*

[FR Doc. 2023–28496 Filed 12–27–23; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2023–0175; FRL–11053–02–R2]

Approval and Promulgation of Implementation Plans; New York; Emission Statement Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) submitted by the New York State Department of Environmental Conservation (NYSDEC) for purposes of enhancing an existing emission statement program for stationary sources in New York State. The SIP revision consists of amendments to regulations in New York's Codes, Rules and Regulations (NYCRR) applicable to the emission statements. These provisions establish electronic reporting requirements for annual emission statements filed by facilities subject to Title V operating permits of the Act beginning in 2022 (for calendar year 2021 emission reporting). The Emission Statement rule also improves the EPA's and the public access to facility-specific emission related data. This action is being taken in accordance with the requirements of the Clean Air Act (Act or CAA).

DATES: This final rule is effective on January 29, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID Number EPA–R02–OAR–2023–0175. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Controlled Unclassified Information (CUI) (formally referred to as Confidential Business Information (CBI)) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Ysabel Banon, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, telephone number (212) 637–3382, or by email at *banon.ysabel@epa.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

On October 4, 2023 (88 FR 68529), the EPA published a Notice of Proposed Rulemaking that proposed to approve a State Implementation Plan (SIP) revision submitted by the NYSDEC on March 21, 2022, for purposes of enhancing an existing Emission Statement program for stationary sources in New York, with a state effective date of December 18, 2020.

The SIP revision was submitted by NYSDEC to satisfy the ozone nonattainment provision of the Act and allows NYSDEC to more effectively plan for and attain the national ambient air quality standards (NAAQS). The purpose of 6 NYCRR Subpart 202–2, ''Emission Statements,'' is to establish the requirements for annual emission statements filed by facilities subject to Title V operating permits under the Act. These requirements are set forth in EPA's Air Emission Report Requirements rule (AERR). *See* 40 CFR 51 Subpart A. The SIP revision establishes electronic reporting requirements for annual emission statements filed by facilities subject to Title V operating permits of the Act beginning in 2022 (for calendar year 2021 emission reporting).

The specific details of NYSDEC's SIP submittal and the rationale for the EPA's approval action are explained in the EPA's proposed rulemaking and are not restated in this final action. For this detailed information, the reader is referred to the EPA's October 4, 2023, proposed rulemaking. *See* 88 FR 68529.

II. Public Comments and EPA Responses

In response to the EPA's October 4, 2023, proposed rulemaking on NYSDEC's SIP revision, the EPA received three supportive comments during the 30-day public comment period. The specific comments may be viewed under Docket ID Number EPA–R02–OAR–2023–0175 on the *https://regulations.gov* website.

Comment 1

One commenter indicated that by enacting policies such as this, the NYSDEC can better regulate the major sources of air pollution and therefore move us toward achieving the NAAQS. Implementing an electronic submission system for major polluters will impose more responsibility on them to meet these emission requirements, especially if these companies are fined for not doing so. Additionally, the commenter suggested that this annual record be made available to the public.

Response 1

The EPA acknowledges the commenter's support of the EPA's proposed rule. Title 6 NYCRR, Chapter III, Part 202, Subpart 202–2.4(j) indicates that the facilities may be subject to enforcement actions, including monetary fines for incomplete and inaccurate emission statements. The commenter can review it at the EPA Docket ID number EPA–R02–OAR–2023–0175. The EPA also recognizes the commenter's request for the EPA to make the records publicly available. The public can access the annual emission records on NYSDEC's website *www.dec.ny.gov/chemical/125566.html#point*.

Comment 2 & 3

Two additional public comments were received, which were supportive of the EPA's proposed approval of NYSDEC's SIP revisions. The commenters indicated that the revisions to the SIP improve air quality.

Response 2 & 3

The EPA acknowledges the commenters' support of the EPA's proposed rule.

III. Final Action

The EPA is approving a SIP revision submitted by NYSDEC on March 21, 2022, for purposes of enhancing an existing Emission Statement program for stationary sources in New York. The SIP revision consists of amendments to Title 6 NYCRR, Chapter III, part 202, subpart 202–2, ''Emission Statements,'' with a state effective date of December 18, 2020.

Based on the EPA's review, the Emission Statement rule contains the necessary applicability, compliance, enforcement, and reporting requirements for an approvable emission statement program.

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the 6 NYCRR Part 202, Subpart 202–2,

''Emission Statements,'' regulation described in the amendments to 40 CFR part 52 as discussed in Section I. of this preamble. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 2 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the State Implementation Plan, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian Tribe has demonstrated that a Tribe has jurisdiction. In those areas of Indian country, the rule does not have Tribal implications and it will not impose substantial direct costs on tribal governments or preempt Tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The NYSDEC did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the Stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 26, 2024. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, and Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Lisa Garcia,

Regional Administrator, Region 2.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart HH—New York

■ 2. In § 52.1670, in the table in paragraph (c), revise the entry for ''Title 6, Part 202, Subpart 202–2'' to read as follows:

§ 52.1670 Identification of plan.

* * * * *

(c) * * *

[1] 62 FR 27968 (May 22, 1997).

EPA-APPROVED NEW YORK STATE REGULATIONS AND LAWS

State citation	Title/subject	State effective date	EPA approval date	Comments
* * *	*	*	*	* *
Title 6, Part 202, Subpart 202–2.	Emission Statements	12/18/2020	12/28/2023	• EPA approval finalized at [insert **Federal Register** citation].
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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 2

[Docket No. USCG–2018–0538]

RIN 1625–AC55

User Fees for Inspected Towing Vessels

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is updating its user fees for seagoing towing vessels that are 300 gross tons or more and revising user fees for other inspected towing vessels. The Coast Guard is issuing these updates because it is required to establish and maintain a fair fee for its vessel inspection services and to separate the fees for inspection options that involve third-party auditors and surveyors from inspection options that do not involve third parties. Under this final rule, owners and operators of vessels using the Alternate Compliance Program, Streamlined Inspection Program, or the Towing Safety Management System options will pay a lower fee than vessels that use the traditional Coast Guard inspection option.

DATES: This final rule is effective March 27, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2018–0538 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: For information about this document call or email Ms. Jennifer Hnatow, Coast Guard; telephone 202–372–1216, email *Jennifer.L.Hnatow@uscg.mil.*

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Abbreviations

ACP Alternate Compliance Program
CAA 2022 Consolidated Appropriations Act of 2022
CGAA 2018 Frank LoBiondo Coast Guard Authorization Act of 2018
CG–CVC Office of Commercial Vessel Compliance
COI Certificate of Inspection
DAPI Drug and Alcohol Program Inspector
DHS Department of Homeland Security
FR Federal Register
FRFA Final Regulatory Flexibility Analysis
FTE Full-Time Equivalent
ICR Information Collection Request
IRFA Initial Regulatory Flexibility Analysis
MISLE Marine Information for Safety and Law Enforcement
MTSA Maritime Transportation Security Act
NAICS North American Industry Classification System
NPRM Notice of proposed rulemaking
OMB Office of Management and Budget
RFA Regulatory Flexibility Act
SBA Small Business Administration
§ Section
SIP Streamlined Inspection Program
SSM Sector Staffing Model
TSMS Towing Safety Management System
TVNCOE Towing Vessel National Center of Expertise
U.S.C. United States Code

II. Basis and Purpose

In this section, the Coast Guard identifies the problem we intend to address, the well-established statutory authority that enables us to issue this final rule, and the recent legislation that provides additional authority for this rulemaking.

A. The Problem We Seek To Address

On June 20, 2016, the Coast Guard published a final rule titled ''Inspection of Towing Vessels'' (81 FR 40003), in which we stated our plan to begin a rulemaking for annual inspection fees for towing vessels. The updated annual inspection fees in this final rule reflect the program's costs for two options for towing vessels to document compliance for obtaining a Certificate of Inspection (COI): [1] the Coast Guard option and the Towing Safety Management System (TSMS) option.[2] As indicated in the 2016 final rule, the existing default fee of $1,030 was identified as the annual inspection fee for towing vessels subject to 46 CFR subchapter M until new rates were established. The existing fee of $1,030 is found in 46 CFR 2.10–101 and applies to any inspected vessel not listed in table 2.10–101.[3]

In addition to towing vessels subject to subchapter M that are required to obtain COIs, towing vessels that qualify as seagoing motor vessels (300 gross tons or more) are required to have COIs under regulations in 46 CFR, chapter I,

[1] *See* 46 CFR 136.130—Options for documenting compliance to obtain a Certificate of Inspection.

[2] The TSMS option is a voluntary inspection option that permits qualified third-party organizations to conduct certain vessel examinations in place of Coast Guard inspections. *See* 46 CFR part 138—Towing Safety Management System (TSMS).

[3] *See* 81 FR 40005. We discuss a recent statutory exception for TSMS-option vessels below.

subchapter I for cargo and miscellaneous vessels.[4] The Coast Guard set the annual inspection fee for these towing vessels at $2,915 in 1995, and this figure has never been updated.[5]

On January 11, 2022, we published a notice of proposed rulemaking (NPRM) entitled ''User Fees for Inspected Towing Vessels'' (87 FR 1378). Having considered comments submitted in response to that NPRM, we are issuing this final rule to update inspection fees for subchapter M and I towing vessels.

B. Legal Authority To Address This Problem

The Coast Guard is issuing this final rule based on authority in Section 2110 of Title 46 of the United States Code (U.S.C.) (46 U.S.C. 2110), which has been delegated to the Commandant under Department of Homeland Security (DHS) Delegation No. 00170.1(II)(92), Revision 01.3. These provisions direct the Coast Guard to establish a fee or charge for inspections and related services described in 46 U.S.C. 2110(a)(1). Under the law, the Coast Guard is required to establish a fee for its inspection services that is fair and based on costs to the Government, the value to the recipient, and public interest. The law also requires that we review the costs of inspecting towing vessels for the Government using the Coast Guard option or a third-party option, and revise such fees if there is a difference.

C. Recent Legislation

On December 4, 2018, Congress enacted the Frank LoBiondo Coast Guard Authorization Act of 2018 (CGAA 2018).[6] Section 815 of the CGAA 2018 directs the Coast Guard to review and revise the fees for towing vessel inspections. First, the Coast Guard must compare the costs to the Government for towing vessel inspections performed by the Coast Guard and towing vessel inspections performed by a third party to determine if the costs are different. The Coast Guard interprets ''costs to the Government'' in Section 815(a) to mean the cost to the Coast Guard for providing inspection and related services to determine whether a vessel meets requirements to maintain its COI. If there is a difference in costs, Section 815 of the CGAA 2018 directs us to revise the fee we assess for such inspections to conform to 31 U.S.C. 9701, and to base the fee on the cost to the Government. We have conducted that comparison and determined that there is a difference in costs to the Government between the inspection options for towing vessels that involve a third party and for those that do not and will revise the fees for these inspections as a result.

On March 15, 2022, Congress enacted the Consolidated Appropriations Act of 2022 (CAA 2022).[7] Section 231 of the CAA 2022 prohibits the Coast Guard from charging inspection user fees for towing vessels using the TSMS option until the requirements of Section 815 of the CGAA 2018 are met.[8] Thus, the intent of this final rule is to meet those requirements of Section 815 of the CGAA 2018 by updating its inspection fees for its Alternate Compliance Program (ACP), Streamlined Inspection Program (SIP), and the TSMS option. Until the Coast Guard implements this final rule and updates to the inspection fees become effective, our agency will not charge TSMS option towing vessels an inspection user fee.

III. Background

A. Origins of Annual Vessel Inspection Fees

The provisions of 46 U.S.C. 2110 require the establishment and collection of user fees for Coast Guard services provided under Subtitle II of Title 46, United States Code. On March 13, 1995, the Coast Guard published the final rule on ''Direct User Fees for Inspection or Examination of U.S. and Foreign Commercial Vessels.'' [9] The fees in that final rule were intended to recover the costs associated with providing Coast Guard vessel inspection services directly or through an alternative reinspection program, although the alternative reinspection program only applied to certain offshore supply vessels. The final rule established user fees for services related to commercial vessel inspection including annual fees for seagoing towing vessels.

On June 20, 2016, the Coast Guard published the ''Inspection of Towing Vessels'' final rule, in which we indicated that, in a subsequent rulemaking, we would establish specific fees that would reflect program costs associated with the TSMS and Coast Guard inspection options for obtaining COIs. We stated that until those specific fees were established, the annual inspection fee for towing vessels subject to 46 CFR subchapter M would be the existing fee of $1,030 in 46 CFR 2.10–101 for any inspected vessel not listed in table 2.10–101.[10]

B. Current Fees for Towing Vessels Subject to 46 CFR Subchapters I and M

With the noted exception of towing vessels using the TSMS-option, the Coast Guard currently charges an annual vessel inspection fee for U.S. and foreign vessels requiring a COI, following the fee schedule set in 46 CFR 2.10–101.[11] The current fee for seagoing towing vessels inspected under subchapter I is $2,915 for all inspection options—the Coast Guard, the ACP, and the SIP. The current fee for towing vessels inspected under all inspection options under 46 CFR subchapter M is $1,030, which is the fee for ''[a]ny vessel not listed in this table.'' As stated above, TSMS fees are not currently being charged, and will not be charged until this final rule is published.

IV. Discussion of Comments and Changes

In response to the NPRM we published January 11, 2022, we received 13 written submissions (plus one duplicate) to our docket. In total, there are 35 comments in response to the proposed rule. These written submissions are available in the public docket for this rulemaking, where indicated under **ADDRESSES** or use the direct link *https://www.regulations.gov/docket/USCG-2018-0538.* The Coast Guard appreciates the comments from the public, as these insights continue to inform Coast Guard actions and programs. Below we summarize the comments and our responses.

The Coast Guard received a number of comments about the proposed fees. Some commenters stated that the proposed fees provided no incentive for choosing the TSMS option, and that the TSMS user fee was unfair due to the third-party costs associated with that option. Some commenters said that the TSMS option offers increased safety, which actually reduces the Coast Guard burden, so this should lead to lower fees. Several commenters requested that the Coast Guard option user fee remain $1,030. One commenter recommended a

[4] *See* 46 CFR 2.01–7 and 90.05–1. Under 46 U.S.C. 3301, seagoing motor vessels are subject to inspection. Towing vessels are motor vessels (vessels propelled by machinery other than steam), and they fall within the definition of ''seagoing motor vessel'' if they are at least 300 gross tons and make voyages beyond the Boundary Line. *See* definitions in 46 U.S.C. 2101.

[5] *See* 60 FR 13550, March 13, 1995; 46 CFR 2.10–101.

[6] Public Law 115–282, 132 Stat. 4192.

[7] Public Law 117–103, 136 Stat. 325.

[8] See Sec. 231 of CAA 2020, Public Law 117–103, 136 Stat. 325.

[9] 60 FR 13550.

[10] *See* 81 FR at 40005.

[11] Under 46 CFR 2.01–6(b), foreign vessels from countries which are nonsignatory to the International Convention for the Safety of Life at Sea, 1974, are issued a COI, if the inspector approves the vessel and its equipment as described in § 2.01–5. We have records of COIs issued to foreign vessels in our Marine Information for Safety and Law Enforcement (MISLE) database, but no records of a COI issued to a foreign towing vessel.

reduction of the user fees for both TSMS option vessels and Coast Guard option vessels.

After considering these comments, we retain the user fees proposed in the NPRM for this final rule. Our reasons are as follows. The law requires the Coast Guard to establish a fee for its inspection services and the fees must be fair and based on the costs to the Government, value to the recipient, and public interest. *See* 31 U.S.C. 9701. In addition, Section 815 of the CGAA 2018 requires the Coast Guard to review the costs to the Government of Coast Guard and third-party inspections for towing vessels. If there is a difference in the costs to the Government, we must revise the annual inspection fees set by the Coast Guard for towing vessels. To revise the fees, we must comply with the same fee-establishing requirements in 31 U.S.C. 9701. The user fee amounts we set are based on the direct and indirect costs for the Coast Guard to perform specific vessel inspection activities. The ''Cost Study to Determine User Fees for Inspected Towing Vessels,'' available in the docket where indicated under the **ADDRESSES** section of this preamble, explains in detail how we determine direct and indirect costs and calculate user fees. In developing the Cost Study, Coast Guard program, budget, and field offices [12] specified the cost model elements, provided the data sources, and validated the methodology used to determine towing vessel user fees, as well as the study results.

Furthermore, the user fees vary because the frequency of inspections and the times for inspection activities vary based on vessel class and inspection option. Selecting the TSMS or Coast Guard inspection option is a business decision by the vessel owner or operator.

Currently, owners and operators of about 70 percent of subchapter M inspected towing vessels with a COI have chosen the TSMS option while 30 percent of COIs for subchapter M inspected towing vessels are issued under the traditional Coast Guard option. This number has not substantially changed since the implementation of the 2016 ''Inspection of Towing Vessels'' final rule and the first COIs were issued in 2017. The user fees for the TSMS option account for the cost to the Government to provide inspections services for this vessel class and inspection option. A vessel owner or operator who selects the TSMS option is making a business decision that should account for the cost to contract with a third-party organization. For these reasons, there are no changes to the final rule in response to the comments on the proposed fees.

Several commenters stated that the Cost Study is flawed. We received comments indicating that the fees are duplicative, excessive, do not accurately reflect the Coast Guard workload, and do not represent the commenters' observed experience.

The Coast Guard disagrees. The fees we proposed for the Coast Guard option and TSMS option accurately estimate the cost to the Government to provide our inspection services. The Cost Study explains how we determine direct and indirect costs. We derive the user fee from the cost to the Coast Guard to perform a specific set of vessel inspection activities. The time it takes to perform any specific inspection activity includes more than just the observed time or ''boots on deck'' time on a vessel. A typical inspection involves pre-inspection activities (for example, identifying vessel type, safety requirements, and vessel history), in-person assessment activities (for example, verifying the integrity of vessel's hull and presence of appropriate safety equipment, and assessing proper operation of electrical and mechanical equipment), and follow-up activities (for example, reporting identified deficiencies, updating vessel data into the Coast Guard's Coast Guard's Marine Information for Safety and Law Enforcement (MISLE) system, and verifying deficiency rectification).

The Coast Guard periodically validates the duration of these vessel inspection activity times. Concurrent inspection activities are allocated less time than the primary inspection activities because concurrent inspection activities are conducted together. Additionally, unlike primary inspection activities, concurrent inspection activities are not allocated travel time credit. Because the time for primary inspection activities is recorded and allocated differently from concurrent inspection activities, such concurrent inspection charges are not redundant. For these reasons, the Coast Guard is maintaining its reliance on the Cost Study in this area. As such, there is no change to this final rule based on these comments.

One commenter stated that the Coast Guard has not yet determined the time and resources necessary for the COI renewal process.

The Coast Guard disagrees. As stated above, the Cost Study explains how we determine direct and indirect costs. The fees we proposed for the Coast Guard option and TSMS option accurately estimate the cost to the Government to provide our inspection services. For this reason, we have made no changes from the proposed rule in response to this comment.

Several commenters stated that the proposed fees impose a financial hardship or burden on small business due to the state of the economy, and that the Coast Guard should defer imposition of fees until we study the costs further.

In accordance with 46 U.S.C. 2110, the Coast Guard is required to establish a fee for its inspection services that is fair and based on the costs to the Government, value to the recipient, and public interest. The proposed user fees were developed in accordance with law, and further delay or study is unnecessary. For this reason, we have made no changes from the proposed rule in response to these comments.

One commenter stated that in not applying the inflation factor, the proposed fees result in a significant increase in annual Government revenues from user fees. The commenter said that for the TSMS option, the current user fee of $1,030 should be increased by the inflation factor of 1.58, and then divided by 5 to account for the 5-year period between inspections and adjusted for the minimal periods of oversight.

The Coast Guard disagrees. We did not adjust the user fee for towing vessels by an inflation factor since the previous user fee was not specific to subchapter M towing vessels and did not reflect the costs to the Coast Guard for performing inspections on towing vessels. The user fee of $1,030 in Table 2.10–101 is for inspections on ''[a]ny inspected vessel not listed in this table.'' The TSMS option user fee in this rule is based on the costs to the Government to provide inspection services. For these reasons, we have made no changes from the proposed rule in response to this comment.

One commenter stated that an inspection visit resulted in lost revenue from a potential barge move.

Lost revenue due to inspections is not within the scope of this rulemaking. In 2004, Congress determined that towing vessels are to be subject to inspection, resulting in the 2016 ''Inspection of Towing Vessels'' final rule. The costs, including lost revenue, were considered in that rulemaking and its accompanying regulatory analysis. For

[12] Coast Guard offices and units involved in the Cost Study development include the—Office of Commercial Vessel Compliance (CG–CVC), Office of Standards Evaluation and Development (CG–REG), Office of Resource Management (CG–83) (formerly CG–DCO–83), Office of Shore Forces (CG–741), Towing Vessel National Center of Expertise (TVNCOE), Finance Center (FINCEN) and Marine Safety Unit Paducah, Kentucky.

this reason, we have made no changes from the proposed rule in response to this comment.

A commenter stated that this rule fails to acknowledge those towing vessels on any water that are more than 15 gross tons and carrying cargo for hire. The commenter said those vessels would also fall under subchapter I and they should be addressed in this rulemaking.

The Coast Guard disagrees. Every request for inspection submitted is reviewed on a case-by-case basis. Per 46 CFR 2.01–7, Table 2.01–7(a), a vessel inspected under subchapter I includes ''[a]ll vessels >15 gross tons carrying freight-for-hire[.]'' However, any vessel that is (1) more than 15 gross tons but less than 300 gross tons and (2) towing and also carrying cargo for hire on board the vessel separate from the tow, would be considered for a multi-service vessel certification. A vessel certificated for more than one service is already covered under 46 CFR 2.10–101. The owner or operator of the vessel must pay only the higher of the two applicable fees. For this reason, we have made no changes from the proposed rule in response to this comment.

Another commenter stated that audits by Drug and Alcohol Program Inspectors (DAPI) and Maritime Transportation Security Act (MTSA) verifications should be removed from the Cost Study because they are not derived from the requirements of subchapter M.

The Coast Guard disagrees. The Coast Guard included DAPI audits (46 CFR 16.401) and MTSA verifications (46 CFR 140.660) in the Cost Study because compliance with these requirements must be met prior to the Coast Guard issuing a COI, regardless of the vessel inspection option chosen. For this reason, we have made no changes from the proposed rule in response to this comment.

One commenter stated that two categories of indirect costs are not appropriate in an assessment of agency costs to provide towing vessel inspection services: (1) policy and oversight costs, and (2) facility overhead and support costs. The commenter further stated that the operating and personnel costs of billets for staff at the Towing Vessel National Center of Expertise (TVNCOE) and Coast Guard District, Area, and Headquarters predate the publication and implementation of subchapter M. The commenter also stated that they were unaware of any new facilities or Coast Guard units that have been created for the purpose of providing towing vessel inspection services or, more broadly, implementing and enforcing subchapter M. The commenter recommended eliminating the policy and oversight costs, and facility overhead and support costs.

The Coast Guard disagrees. Policy and oversight activities are an essential element to ensure consistent application of nationwide towing vessel inspection requirements. Facility overhead and support costs are included to fairly account for the cost to the Government to provide inspection services. Historically, operating and overhead costs have been included in vessel inspection user fees, as well as other Coast Guard user fees such as merchant mariner credentialing and vessel documentation. For these reasons, we have made no changes from the proposed rule in response to this comment.

V. Discussion of the Rule

This final rule updates existing annual inspection fees for both seagoing towing vessels (300 gross tons or more) and vessels subject to the towing-vessel regulations in 46 CFR, subchapter M issued in 2016.

The annual inspection fees are located in 46 CFR part 2—Vessel Inspections. In addition to the fees in § 2.10–101, this part contains definitions in § 2.10–25. We are adding the following new defined terms to § 2.10–25:

- Alternate Compliance Program option;
- Annual vessel inspection fee;
- Coast Guard option;
- Streamlined Inspection Program option;
- Towing Safety Management System option; and
- Towing vessel.

We define *annual vessel inspection fee* as the fee charged by the Coast Guard for providing inspection and related services to determine whether a vessel meets the requirements to maintain its COI. The fee charged by the Coast Guard reflects the cost to the Coast Guard. There are several existing options for inspection, which we define in revised § 2.10–25 by referencing the regulations that establish each option. For both seagoing and subchapter M towing vessels, there is a Coast Guard option in which the Coast Guard performs all the relevant inspection activity. For both types of vessels, there is also a third-party option, already established in regulation, in which a third party performs some of the relevant activity, but the Coast Guard still inspects the vessel and examines evidence of compliance provided by third parties.

For seagoing towing vessels there is an additional option, the SIP. The SIP option does not involve a third party. Under the SIP option, a vessel is inspected in accordance with an approved Vessel Action Plan that the company's SIP agent develops with guidance from the Coast Guard. In our definition of SIP, we point to subpart E of 46 CFR part 8, which spells out SIP program requirements.

We define *towing vessel* as a commercial vessel engaged in or intending to engage in the service of pulling, pushing, or hauling alongside, or any combination of pulling, pushing, or hauling alongside.

We are also modifying the definition of an existing term in § 2.10–25, *Seagoing towing vessel.* We are removing the modifier ''seagoing'' from the definition itself and inserting a description of what seagoing means. The inserted description is ''and that makes voyages beyond the Boundary Line as defined by 46 U.S.C. 103.'' [13] The vessel must be 300 gross tons or more, to distinguish seagoing towing vessels from towing vessels subject to subchapter M that travel beyond the Boundary Line. We also remove the hyphen from seagoing.

A. Categories of Annual Fees

For towing vessels subject to 46 CFR subchapter M, we added two categories of fees: the Coast Guard option and the TSMS option. For seagoing towing vessels subject to 46 CFR subchapter I, we develop three fee categories: the Coast Guard option, the ACP option, and the SIP option. This fee structure helps to ensure the Coast Guard is able to recover full costs to the Government and to separate annual inspection fees for options involving third-party surveys and audits of towing vessels using safety management systems.

B. Amending Annual Inspection Fees for Seagoing Towing Vessels Subject to 46 CFR Subchapter I

We will be charging one of three annual fees for seagoing towing vessels that are inspected under subchapter I:

- $2,747 for those using the Coast Guard option;
- $1,850 for those using the ACP option; and
- $2,260 for those using the SIP option.

The previous annual fee for seagoing towing vessels that are inspected under subchapter I was $2,915.

For a detailed discussion of how these fees were derived, see *Methodology for*

[13] Under 46 U.S.C. 103 and 33 U.S.C. 151(b), boundary lines are used for dividing inland waters of the United States from the high seas to delineate the application of certain U.S. statutes. For a list of boundary lines and the statutes those lines are used to delineate, see 46 CFR part 7, which lists boundary lines for the Atlantic Coast, Gulf Coast, Pacific Coast, and the states of Alaska and Hawaii.

Calculating Fees in section V.D of this preamble.

C. Establishing Specific Annual Inspection Fees for Towing Vessels Subject to 46 CFR Subchapter M

We will also be charging one of two fees for towing vessels inspected under subchapter M:

- $2,184 for those using the Coast Guard option, and
- $973 for those using the TSMS option.

The previous annual fee applied to subchapter M towing vessels was $1,030.

For a more detailed discussion of how these fees were derived, see *Methodology for Calculating Fees* in section V.D of this preamble.

D. Methodology for Calculating Fees

This section summarizes the methodology for calculating fees. For more details, see the Cost Study [14] in the docket where indicated under the **ADDRESSES** section of this preamble.

To derive the costs of the various inspection types, we used an activity-based costing [15] approach in conjunction with the Sector Staffing Model (SSM). The SSM is an activity-based model designed to establish human capital requirements and quantify resources at Shore Forces units.[16] The SSM measures specific activity and frequency to determine the Full-Time Equivalent (FTE) workforce needed to meet a particular workload. Data in the model is derived from Coast Guard enterprise databases and surveys conducted at the Coast Guard field unit level. The model also incorporates unit specific travel times for conducting missions, collateral duty workload, and mission required training. In Spring 2012, the SSM was accredited in accordance with official Coast Guard policy and currently serves as the primary decision tool for managing sector enterprise staffing. Table 1 shows the cost of activities for providing COI services to each type of inspection. These costs are derived using SSM FTE calculations; see the Cost Study in the docket for the full derivation of figures.

TABLE 1—PER VESSEL COST OF ACTIVITIES FOR PROVIDING COI SERVICES BY USER FEE SEGMENT

	Subchapter M: Coast Guard	Subchapter M: TSMS	Subchapter I: Coast Guard	Subchapter I: ACP	Subchapter I: SIP
Inspection Activity Costs *	$1,182	$407	$1,617	$873	$1,213
Travel Costs	317	40	356	356	356
Supervision and Administration Costs	243	84	332	179	249
Indirect Costs [17]	442	442	442	442	442
Total Annual Costs	2,184	973	2,747	1,850	2,260

* Due to a rounding error in the NPRM, Inspection Activity Costs were overstated by $1 for four of the inspection types. This does not impact the final user fees.

The Coast Guard intends to collect one of five different user fees from the approximately 4,762 towing vessels that require COIs under subchapters I and M.[18] Table 2 shows the fee charged before the CAA 2022 went into effect, the CAA 2022 fee, the final rule fee, the incremental fee adjustment from the CAA 2022 fee, and the percent change to the user fee from the CAA 2022 fee.[19] The annual cost of services for each vessel class is the final rule user fee for that vessel class.

TABLE 2—PRE-CAA 2022, CAA 2022 SUBCHAPTER M AND I USER FEES AND FINAL RULE USER FEE ADJUSTMENT AMOUNTS

Fee type/user fee class	Pre-CAA 2022 fee	CAA 2022 fee	Final Rule fee	Incremental fee adjustment	Percent change (%)
Subchapter M: Coast Guard option	$1,030	$1,030	$2,184	$1,154	112
Subchapter M: TSMS option	1,030	0	973	973	.....
Subchapter I: Coast Guard option	2,915	2,915	2,747	−168	−6
Subchapter I: ACP option	2,915	2,915	1,850	−1,065	−37
Subchapter I: SIP option	2,915	2,915	2,260	−655	−22

VI. Regulatory Analyses

We developed this final rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on these statutes or Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and

[14] The Cost Study is the same one referenced in the NPRM and has not been changed.

[15] Activity-based costing is a method for determining the cost of a service based on the cost of each individual element of that service.

[16] Shore Forces units are Coast Guard sector commands and their subunits or field units. See the Coast Guard Strategic Cost Manual, COMDTINST M7000.4 (February 2005), which is available in the docket.

[17] Indirect Costs are costs such as facility and overhead costs as well as IT costs, since these costs are fixed regardless of inspection type, the costs were divided by the vessel population as of the Cost Study.

[18] Vessel population data came from MISLE as of 2023. See the *Affected Population* section for more details.

[19] The NPRM for this rule was published prior to the CAA 2022, thus the NPRM refers to the ''Current Fee.'' The ''Current Fee'' of the NPRM is now labeled as the ''Pre-CAA 2022 Fee'' to avoid confusion.

equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866, as amended by Executive Order 14094. This rule has not been reviewed by OMB. A regulatory analysis follows.

Changes From the Notice of Proposed Rulemaking

This final rule's regulatory analysis has made two changes from the NPRM we published in 2022 (87 FR 1378), but the user fees are not changed from the NPRM's rates. First, we updated the populations to reflect current data from MISLE; the subchapter M population decreased while the subchapter I population remained relatively stable.

Second, the baseline for TSMS fees under subchapter M decreased from $1,030 to $0. This is because the CAA 2022 directed the Coast Guard not to charge user fees to TSMS vessels under subchapter M until it follows the steps in Section 815 of the CGAA 2018, and based on its findings reported above, revises its fees. This rule will revise those fees effective March 27, 2024.

Baselines

Currently, towing vessels are inspected under subchapter I or subchapter M, dependent on their size and area of operation. Owners and operators of towing vessels inspected under 46 CFR subchapter I pay a user fee of $2,915 annually. Owners and operators of towing vessels under 46 CFR subchapter M that choose to be inspected by the Coast Guard pay a user fee of $1,030 annually. Owners and operators of towing vessels under subchapter M that choose the TSMS option do not pay a user fee because of the CAA 2022. However, as noted earlier, the subchapter M user fee is not specific to towing vessels; rather it is for all inspected vessels that do not have a specific user fee on Table 2.10–101. Prior to the CAA 2022 owners and operators of towing vessels under subchapter M that choose the TSMS option paid a user fee of $1,030 annually.

Under the current CAA 2022 baseline, we calculate that owners and operators of 43 towing vessels inspected under subchapter I pay $125,345 annually, and that owners and operators of 4,719 towing vessels inspected under subchapter M pay $1,458,480 annually for inspection services, respectively. Thus, the current transfer from vessel owners to the Coast Guard for towing vessel inspection services is $1,583,825 annually. Prior to the CAA 2022, when the TSMS user fee was not suspended, owners and operators of all subchapter M towing vessels (TSMS option and Coast Guard option) paid the $1,030 user fee. This would have resulted in an annual transfer from subchapter M and I vessel owners and operators to the Coast Guard for towing vessel inspection services of $4,985,915. Owners and operators of towing vessels choose between several vessel inspection alternatives. Once selected, the inspection option is unlikely to change due to a change in user fees, since there are private business costs associated with changing inspection options. The Coast Guard's COI service costs are fully funded through annual appropriations.[20]

This final rule establishes a user fee specific to towing vessels under subchapter M, revises the user fee specific to towing vessels under subchapter I, and establishes user fees for alternatives for vessel inspection that require fewer Coast Guard inspection activities or that take less time and thus have a lower cost to the Coast Guard. This updated structure for user fees will help to ensure the Coast Guard's ability to offset costs to the Government, and to separate annual inspection fees for options involving third-party surveys and audits of towing vessels using safety management systems. From a baseline of the CAA 2022, this final rule results in an estimated $4.8 million annual transfer payment from owners and operators of towing vessels to the Federal Government for COI services. The 10-year transfers, undiscounted, are $49,320,822. The discounted annualized figure, at 7 percent, is $4,918,994. The discounted annualized figure, at 3 percent, is $4,926,329.

The Coast Guard also does the following in this final rule:

(1) Modifies the definition in § 2.10–25 of *Sea-going towing vessel.* We remove the modifier ''seagoing'' from the definition and replace it with a description of what ''seagoing'' means. The updated language is ''and that makes voyages beyond the Boundary Line as defined by 46 U.S.C. 103.'' Also, we specify that the vessel must be 300 gross tons or more to distinguish seagoing towing vessels from towing vessels that travel beyond the Boundary Line, which may be subject to subchapter M. This is an administrative change, and it would have no economic impact.

(2) Amends the user fees for towing vessels under 46 CFR subchapter I. The current fee for the 43 seagoing towing vessels inspected under subchapter I is $2,915 for all inspection options (Coast Guard, ACP, and SIP). This final rule makes the fees specific to each inspection as shown below in table 3. Owners and operators of vessels have already chosen their inspection option and are unlikely to change their current option. This is because there are costs associated with switching inspection options and there are transactions in private industry and business-specific costs [21] beyond the inspection cost that make the user fee a small portion of the overall cost of inspections.

TABLE 3—CURRENT AND FINAL RULE USER FEES FOR TOWING VESSELS UNDER 46 CFR SUBCHAPTER I

Inspection type	Current fee	Revised fee
Coast Guard option	$2,915	$2,747
ACP option		1,850
SIP option		2,260

(3) Creates a specific user fee category for the 4,719 towing vessels subject to 46 CFR subchapter in the table of fees in § 2.10–101 and updates the current user fees for annual inspection fees for towing vessels to reflect the specific program costs associated with the two subchapter M options: the TSMS option and the Coast Guard inspection option. The Coast Guard inspection option's current annual fee is $1,030 for towing vessels subject to subchapter M. The existing fee of $1,030 is found in 46 CFR 2.10–101 and applies to any inspected vessel not listed in table 2.10–101. Owners and operators of subchapter M vessels that choose the TSMS inspection option do not currently pay a user fee. This final rule makes the fees specific to each inspection type as shown below in table 4. Similar to owners and operators of subchapter I vessels, owners and operators of subchapter M vessels have already chosen their inspection option and are unlikely to change for the same reasons.

[20] The user fees collected for these services are offsetting receipts and are deposited to the Department of Treasury and credited to DHS appropriation as proprietary receipts. *See* 46 U.S.C. 2110(h).

[21] Transaction costs vary by inspection option. Towing vessels that elect to participate in the ACP must comply with the requirements in 46 CFR part 8 subpart D, that includes working with an ACP authorized classification society. Towing vessels that elect to participate in the SIP must comply with the requirements in 46 CFR part 8 subpart E, that includes the development of a Company Action Plan and a Vessel Action Plan.

TABLE 4—CURRENT AND REVISED USER FEES FOR TOWING VESSELS UNDER SUBCHAPTER M

Inspection type	Current fee	Revised fee
Coast Guard option	$1,030	$2,184
TSMS option	0	973

(4) Defines the following new terms added to the table of fees in § 2.10–101: *Annual vessel inspection fee, Alternative Compliance Program option, Coast Guard option, Streamlined Inspection Program option, Towing Safety Management System option,* and *Towing vessel.* This is an administrative change and has no economic impact. All these points are described in greater detail in the Cost Study.

Affected Population

To obtain the affected population for this final rule, we used the MISLE system. MISLE is the Coast Guard's vessel and marine activity database and contains the best and most readily available vessel population data. According to MISLE data as of 2023, the total affected population of this final rule is 4,762 inspected towing vessels. There are approximately 4,719 towing vessels that will require inspection under 46 CFR subchapter M and 43 towing vessels that are inspected under 46 CFR subchapter I. Coast Guard subject matter experts in the Office of Commercial Vessel Compliance (CG–CVC) estimate that the subchapter M population will increase by an average of 23 vessels per year because a number of subchapter M vessels began the inspection process to obtain a COI during the 4-year phase-in period but did not complete the process. The Coast Guard believes that, over time, these vessels will obtain new COIs; thus, the subchapter M population will increase. The subchapter I population is expected to remain stable because it historically has done so.

Rather than a single fee category for all towing vessels covered by a subchapter, the Coast Guard is creating two categories for subchapter M and three categories for subchapter I vessels. For subchapter M, the inspection types are the Coast Guard option and the TSMS option. For subchapter I, the inspection types are the Coast Guard option, the ACP option, and the SIP option. Table 5 presents the total population of inspected towing vessels impacted by this final rule and the current breakdown of inspections within each subchapter. Table 6 presents the projected subchapter M population and their projected counts of inspection type. We assume that the subchapter M towing vessel population will maintain their current split of 70 percent using the TSMS option and 30 percent using the Coast Guard option during the duration of the analysis.

TABLE 5—TOTAL AFFECTED POPULATION FOR INSPECTED TOWING VESSELS

User Fee Categories Population

46 CFR Subchapter M		Coast Guard option	TSMS option	Total
Population		1,416	3,303	4,719
% of Population		30%	70%	100%
46 CFR Subchapter I	Coast Guard option	Vessel Inspection Alternatives		Total
		Alternate Compliance Program (ACP) option	Streamlined Inspection Program (SIP) option	
Population	26	16	1	43
% of Population	61%	37%	2%	100%
Total Population				4,762

TABLE 6—PROJECTED SUBCHAPTER M POPULATION BY INSPECTION OPTION

Estimated annual subchapter M population by inspection type		
Year	CG option	TSMS option
Year 1	1,416	3,303
Year 2	1,423	3,319
Year 3	1,429	3,336
Year 4	1,436	3,352
Year 5	1,443	3,368
Year 6	1,450	3,384
Year 7	1,457	3,400
Year 8	1,464	3,416
Year 9	1,471	3,432
Year 10	1,478	3,448

Costs and Benefits

This final rule does not impose any new societal costs because all the inspection activities are done by regulated entities and the Coast Guard. Instead, the impacts of this final rule are in the form of transfer payments, which are monetary payments from one group to another that do not affect the total resources available to society.

This final rule does not provide any quantitative benefits; however, revising

user fees to reflect the actual cost for the Coast Guard to provide inspection services is a qualitative benefit. The result is a fairer distribution of costs to inspected towing vessels by inspection type. Section 2110 of Title 46 of the U.S.C. directs that the fee or charge be established in accordance with 31 U.S.C. 9701, which specifies that each charge be fair and based on the costs to the Government; the value of the service or thing to the recipient, public policy, or interest served; and other relevant facts. Consistent with these objectives, once a fee or charge is established, Section 2110 allows the fee or charge to be adjusted to accommodate changes in the cost of providing a specific service or thing of value. This final rule aids the Coast Guard in compliance with those statutory requirements.

Transfer Payments

This final rule adjusts the user fees collected from the current entities so that there are now five different fees based on the towing vessel subchapter and program used for vessel certification. There currently are 4,762 affected towing vessels. Table 7 shows the pre-CAA 2022 baseline fee, CAA 2022 baseline fee, the final rule fee, the change, and the percent change to the user fee from the pre-CAA 2022 and CAA 2022 baseline fees. The annual cost of services for each vessel class is the user fee for that vessel class.

TABLE 7—PRE-CAA 2022 BASELINE FEE, CAA 2022 BASELINE FEE, FOR 46 CFR SUBCHAPTER M AND I USER FEES AND FINAL RULE USER FEE ADJUSTMENT AMOUNTS

Fee type/user fee class	Pre-CAA 2022 baseline fee	CAA 2022 baseline fee	Final rule fee	Incremental fee adjustment from pre-CAA 2022	Percent change from pre-CAA 2022	Incremental fee adjustment from CAA 2022	Percent change from CAA 2022
Subchapter M: Coast Guard option	$1,030	$1,030	$2,184	$1,154	112%	$1,154	112%
Subchapter M: TSMS option	1,030	0	973	−57	−6%	973	.....
Subchapter I: Coast Guard option	2,915	2,915	2,747	−168	−6%	−168	−6%
Subchapter I: ACP option	2,915	2,915	1,850	−1,065	−37%	−1,065	−37%
Subchapter I: SIP option	2,915	2,915	2,260	−655	−22%	−655	−22%

Note: Since there are no distinct categories for TSMS, SIP, or ACP in the current user fee table, all owners and operators of subchapter M vessels would normally pay one fee and all owners and operators of subchapter I vessels pay one fee.

In table 8, we show the total increase in annual transfer payments from each vessel class to the Government and the total increase for all vessels. For example, owners and operators of subchapter M vessels that choose the Coast Guard option will pay an additional $1,154 per vessel in user fees to the Coast Guard for inspection services. Negative numbers represent a decrease in user fees. Transfer payments are monetary payments from one group to another that do not affect total resources. For this final rule, a user fee is a transfer payment from the vessel's owner or operator to the Government to offset the costs to the Coast Guard for providing COI services. This is calculated by multiplying the vessel population by the incremental fee change. Because the population of 46 CFR subchapter M vessels is projected to increase, table 9 shows annual incremental transfer payments for this subchapter. Totals are calculated by multiplying the populations in table 6 by the appropriate fees.

TABLE 8—FIRST YEAR ANNUAL INCREMENTAL FEE AMOUNTS [22]

Fee type/user fee class	Estimated population	Incremental fee change from pre-CAA 2022 baseline	First year fee transfer payments from pre-CAA 2022 baseline	Incremental fee change from CAA 2022 baseline	First year fee transfer payments from CAA 2022 baseline
Subchapter M: Coast Guard option	1,416	$1,154	$1,634,064	$1,154	$1,634,064
Subchapter M: TSMS option	3,303	−57	−188,271	973	3,213,819
Subtotal	4,719	.....	1,445,793	.....	4,847,883
Subchapter I: Coast Guard option	26	−168	−4,368	−168	−4,368
Subchapter I: ACP option	16	−1,065	−17,040	−1,065	−17,040
Subchapter I: SIP option	1	−655	−655	−655	−655
Subtotal	43	.....	−22,063	.....	−22,063
Annual Total	.....	.....	1,423,730	.....	4,825,820

TABLE 9—SUBCHAPTER M ANNUAL INCREMENTAL TRANSFER PAYMENTS [23]

Year	CG option Pre-CAA 2022 baseline	TSMS option pre-CAA 2022 baseline	Subchapter M total from Pre-CAA 2022 baseline	CG option CAA 2022 baseline	TSMS option CAA 2022 baseline	Subchapter M total from CAA 2022 baseline
Year 1	$1,634,064	−188,271	$1,445,793	$1,634,064	$3,213,819	$4,847,883
Year 2	1,642,142	−189,183	1,452,959	1,642,142	3,229,387	4,871,529
Year 3	1,649,066	−190,152	1,458,914	1,649,066	3,245,928	4,894,994
Year 4	1,657,144	−191,064	1,466,080	1,657,144	3,261,496	4,918,640
Year 5	1,665,222	−191,976	1,473,246	1,665,222	3,277,064	4,942,286

[22] The incremental changes in transfers are from the specified baseline to the Final Rule user fee.

[23] The incremental changes in transfers are from the specified baseline to the Final Rule user fee.

TABLE 9—SUBCHAPTER M ANNUAL INCREMENTAL TRANSFER PAYMENTS [23]—Continued

Year	CG option Pre-CAA 2022 baseline	TSMS option pre-CAA 2022 baseline	Subchapter M total from Pre-CAA 2022 baseline	CG option CAA 2022 baseline	TSMS option CAA 2022 baseline	Subchapter M total from CAA 2022 baseline
Year 6	1,673,300	−192,888	1,480,412	1,673,300	3,292,632	4,965,932
Year 7	1,681,378	−193,800	1,487,578	1,681,378	3,308,200	4,989,578
Year 8	1,689,456	−194,712	1,494,744	1,689,456	3,323,768	5,013,224
Year 9	1,697,534	−195,624	1,501,910	1,697,534	3,339,336	5,036,870
Year 10	1,705,612	−196,536	1,509,076	1,705,612	3,354,904	5,060,516

Note: The total transfer payments for subchapter M vessels rise annually due to an estimated annual increase in the population of 23 vessels.

The reduction in fees for owners and operators of vessels under 46 CFR subchapter I will result in a decrease in transfer payments in the first year from the subchapter I towing vessel industry to the Government of $22,063. Relative to the CAA 2022 baseline, the Coast Guard expects to have an increase in transfer payments from owners and operators of subchapter M towing vessels for the COI services of $4,847,883 in the first year to the Government. The net change in transfer payments is $4,825,820 in the first year. The 10-year transfer payments, undiscounted, total $49,320,822. The discounted annualized figure, at 7 percent, is $4,918,994.

Relative to the Pre-CAA 2022 baseline, the Coast Guard expects to have an increase in transfer payments from owners and operators of subchapter M towing vessels for the COI services of $1,445,793 in the first year to the Government as shown in table 9. The sum of transfer payments for vessels under subchapter I and M is $1,423,730 in the first year from the subchapter I towing vessel industry to the Government since subchapter I user fees are decreasing. The total 10-year change in transfer payments, undiscounted, is $14,550,082. The discounted annualized figure, at 7 percent, is $1,451,108. Table 10 summarizes the total 10-year change in transfer payments from the towing vessel industry to the Government.

TABLE 10—DISCOUNTED TRANSFER PAYMENTS FROM TOWING VESSEL OPERATORS TO THE GOVERNMENT

Year	Pre-CAA 2022 baseline			CAA 2022 baseline		
	Undiscounted	Discounted		Undiscounted	Discounted	
		7%	3%		7%	3%
1	$1,423,730	$1,330,589	$1,382,262	$4,825,820	$4,510,112	$4,685,262
2	1,430,896	1,249,800	1348,757	4,849,466	4,235,711	4,571,087
3	1,436,851	1,172,898	1,314,922	4,872,931	3,977,763	4,459,422
4	1,444,017	1,101,634	1,282,990	4,896,577	3,735,575	4,350,545
5	1,451,183	1,034,673	1,251,803	4,920,223	3,508,051	4,244,228
6	1,458,349	971,760	1,221,344	4,943,869	3,294,309	4,140,412
7	1,465,515	912,649	1,191,598	4,967,515	3,093,519	4,039,044
8	1,472,681	857,114	1,162,548	4,991,161	2,904,901	3,940,069
9	1,479,847	804,939	1,134,180	5,014,807	2,727,723	3,843,432
10	1,487,013	755,922	1,106,477	5,038,453	2,561,294	3,749,082
Total *	14,550,082	10,191,977	12,396,882	49,320,822	34,548,958	42,022,583
Annualized		1,451,108	1,453,293		4,918,994	4,926,329

Note: Totals may not sum due to rounding.

Regulatory Alternatives

Alternatives considered include adjusting our current user fees for inflation, updating only the Coast Guard option user fees, or continuing with the current user fees. Each of these options will be considered in the following discussion.

Under the first alternative, Coast Guard considered adjusting the 1995 user fees for inflation from 1995 dollars to 2022 dollars. To adjust for inflation, we use an inflation factor from the annual gross domestic product deflator data.[24] We calculate the inflation factor of 1.76 by dividing the annual 2022 index number (117.996) by the annual 1995 index number (66.993). We then multiply the current fees for 46 CFR subchapters I and M by the inflation factor and round it to the nearest dollar. If we simply adjusted the user fees for inflation, the annual fees charged under subchapters I and M would increase 76 percent, by $2,215 and $783, respectively. These fees, when multiplied by the number of annual COI renewals, would yield a total annual revenue of approximately $8.8 million and an increase in transfer payments of $3.8 million. We rejected this alternative because the annual revenue collected under this methodology would not reflect the full cost to the Coast Guard of providing the COI-related services. Table 11 shows the inflation adjusted user fees for subchapter I and M vessels.

[24] U.S. Bureau of Economic Analysis, ''Table 1.1.4. Price Indexes for Gross Domestic Product,'' *https://apps.bea.gov/iTable/?reqid=19&step=3&isuri=1&1910=x&0=-99&1921=survey&1903=4&1904=2009&1905=2018&1906=a&1911=0* (accessed December 1, 2023).

TABLE 11—COMPARISON OF USER FEES IN 1995 DOLLARS AND 2022 DOLLARS
[Alternative 1] *

Fee category	1995 $ fee	Inflation factor	2022 dollars	Population	Incremental fee adjustment	Annual fee transfer payments	Annual revenue collected from user fees
Subchapter I vessels	$2,915	1.76	$5,130	43	$2,215	$95,245	$220,590
Subchapter M vessels	1,030	1.76	1,813	4,719	783	3,694,977	8,555,547
Total	.....	.....	.....	.....	.....	3,790,222	8,776,137

Note: All dollar figures rounded to the closest whole dollar.

In the second alternative, we considered updating only the Coast Guard option user fees. We rejected this alternative because it would not comply with Section 815 of the CGAA 2018. Section 815 directs the Coast Guard to review and, based on our findings, revise the fee for towing vessel inspections. First, the Coast Guard must compare the costs to the Government of towing vessel inspections performed by the Coast Guard and towing vessel inspections performed by a third party, to determine if they are different. We have conducted that comparison and determined that there is a difference in costs to the Government between the inspection options for towing vessels that involve a third party and those that do not. If there is a difference in costs, Section 815 of the CGAA 2018 directs us to revise the fees we assess for towing vessel inspections to conform to 31 U.S.C. 9701 and to base the fee on the cost to the Government.

In our third alternative, we considered maintaining the current user fee [25] without an adjustment. We rejected this alternative because the annual revenue collected under this methodology would not cover the full cost to the Coast Guard of providing the COI-related services.

B. Small Entities

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, we have considered the impact of this rule on small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

A Final Regulatory Flexibility Analysis (FRFA) discussing the impact of this rule on small entities follows. An FRFA addresses the following:

(1) A statement of the need for, and objectives of, the rule;

(2) A statement of the significant issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis (IRFA), a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[26]

Below is a discussion of the FRFA analysis for each of these six elements.

(1) A statement of the need for, and objectives of, the rule.

The Coast Guard is updating the user fees for inspected towing vessels because after reviewing the costs to the Government of inspections under the Coast Guard option or options using a third party, the Coast Guard has determined that updates are necessary to ensure that fees for all options are fair and based on costs to the Government. User fees for towing vessels inspected under 46 CFR subchapter I have not been updated since 1995. The changes to the fees are also consistent with the 2016 ''Inspection of Towing Vessels'' final rule, in which we stated that we planned to issue a separate rulemaking for annual inspection fees for towing vessels that would reflect the specific program costs associated with the two 46 CFR subchapter M options—the TSMS option and the Coast Guard inspection option.

The objective of this final rule is to comply with the law, which requires the Coast Guard to establish a fee or charge for inspections and related services described in 46 U.S.C. 2110(a)(1). Under this law, the Coast Guard is required to establish a fee for its inspection services that is fair and based on costs to the Government, the value to the recipient, and public interest.

(2) A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

This regulatory action received no comments directly related to the IRFA analysis. However, we received several comments regarding financial hardship due to the fee increase. The Coast Guard, in accordance with 46 U.S.C. 2110, is required to establish a fee for its inspection services that is fair and based on the costs to the Government, value to the recipient, and public interest. The user fees were developed in accordance with law. Each entity chooses its inspection option and corresponding fee according to its business needs. For a review of all the public comments received on the rulemaking, see section IV., *Discussion of Public Comments.*

(3) The response of the agency to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

[25] Per the CAA 2022, towing vessels using the TSMS option would continue to pay no annual inspection user fee.

[26] 5 U.S.C. 604(a)(1) through (6).

This regulatory action received no comments from the Chief Counsel for the Advocacy of the SBA.

(4) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

This final rule will affect the owners and operators of certain towing vessels under 46 CFR subchapters I and M. We retrieved this towing vessel population from the Coast Guard's MISLE system. From this database, we identified 4,762 vessels affected by this final rule—4,719 subchapter M towing vessels and 43 subchapter I towing vessels (see table 5). There are 1,223 unique companies that own or operate these vessels. Eight companies own vessels under both subchapters I and M. One company owns only subchapter I vessels.

We used available information on operator names and addresses to research public and proprietary databases for entity type (subsidiary or parent company), primary line of business, employee size, revenue, and other information.[27] We found vessels owned by 21 government entities and 4 nonprofit entities. The remaining 1,211 vessels are owned by business entities. For governmental jurisdictions, we determined whether the jurisdiction had populations of less than 50,000 as per the criteria in the RFA. For nonprofits, we evaluated whether the nonprofit was independently owned and operated and if it was not dominant in its field.[28] For the business entities, we matched their information with the SBA's latest *Table of Small Business Size Standards* to determine if a business entity is small in its primary line of business as classified in the North American Industry Classification System (NAICS).[29]

We broke the population down into 46 CFR subchapters I and M. For subchapter M, we used a random sample from the unique towing vessel companies to reach the 95-percent confidence level. Using Cochran's Formula, the Coast Guard chose a statistically valid random sample of 385 entities that own and operate towing vessels.[30]

There are a total of 97 NAICS-coded industries in this final rule's sample affected population. Table 12 displays the 10 industries that appear most frequently in the affected population of owners or operators of towing vessels in subchapters I and M.

TABLE 12—MOST COMMON NAICS CODES

NAICS code	Description	Small entity definition	Count of towing vessel owners or operators	Percent of total *
488330	Navigational Services to Shipping	<$47,000,000	45	11
238910	Site Preparation Contractors	<$19,000,000	33	8
441222	Boat Dealers	<$40,000,000	29	7
488410	Motor Vehicle Towing	<$9,000,000	18	5
236115	New Single-family Housing Construction (Except For-Sale Builders).	<$45,000,000	16	4
336611	Ship Building and Repairing	<1,300 Employees	9	2
237990	Other Heavy and Civil Engineering Construction	<$45,000,000	8	2
713930	Marinas	<$11,000,000	8	2
483211	Inland Water Freight Transportation	<1,050 Employees	7	2
551111	Offices of Bank Holding Companies	<$38,500,000	6	2

Note: Total does not sum to 100 percent, since these percentages reflect only the top 10 most common NAICS codes of the sample. The remaining 55 percent of NAICS codes were not within the 10 most commonly occurring.

For subchapter M, the Coast Guard chose a sample of 385 businesses that own and operate the towing vessels. Of the 385 businesses, 33 exceeded the SBA small business size standards, 271 companies were considered to be small businesses by the SBA size standards, and 81 companies had no information available. Consistent with DHS's practices, entities with no information available are considered small entities. Thus, there are 352 businesses in our sample that we consider to be small entities. Based on our random sample, 91.4 percent of subchapter M entities are considered small and therefore when applied to the population of unique towing vessel companies, 1,118 subchapter M entities are considered small.

For subchapter I, we searched all nine unique towing vessel companies in the available databases. All had available revenue and employee data. Of these nine unique towing vessel companies, eight exceeded the SBA small business size standards and one was considered a small entity by the SBA size standards.

For this analysis, we considered the annual weighted average transfer from industry to the Coast Guard by subchapter. For subchapter M vessels, we found the average fleet size for small entities is two vessels and multiplied it by the weighted average of incremental changes in user fees. According to our analysis of small subchapter M vessels, 98 percent of entities choose the Coast Guard option for their inspection option and 2 percent choose the TSMS option. Thus, we multiplied the rates for entities choosing their inspection option by the incremental change in user fees compared to the CAA 2022 baseline and the average fleet size for small subchapter M entities, which yielded an average increase in impact of $1,150 per subchapter M vessel and $2,300 per small subchapter M entity due to the incremental change in subchapter M fees.[31] We repeated this process for subchapter I entities. We found that each small entity had an average fleet size of two vessels and multiplied it by the weighted average of incremental changes in user fees. According to our

[27] *https://www.cortera.com/, https://www.manta.com/,* and *https://www.reference usagov.com* (accessed July 10, 2023).

[28] We used *https://www.guidestar.org* to evaluate nonprofits (accessed July 10, 2023).

[29] *https://www.sba.gov/document/support-table-size-standards* (accessed July 10, 2023).

[30] A statistically valid random sample size of 292 businesses would be required to achieve a 95-percent confidence level out of the 1,222 unique towing vessel companies. In this analysis, the Coast Guard oversampled to analyze 385 businesses to ensure enough data and information was available on the businesses to meet the sampling requirements.

[31] The incremental change in subchapter M Coast Guard option user fees is $1,154, while the incremental change in subchapter M TSMS option user fee is $973. Thus, the average impact of $2,300 was found by taking the weighted average of their inspection options by the fleet size. ($1,154 × 98%) + ($973 × 2%) = $1,150. $1,150 × 2 = $2,300.

analysis of small subchapter I vessels, all entities chose the ACP inspection option. This final rule will save subchapter I entities $2,130. Tables 13 and 14 show the impact on revenues for small entities that we had revenue data for under each subchapter.

TABLE 13—ESTIMATED ANNUAL REVENUE IMPACT FOR SMALL ENTITIES UNDER 46 CFR SUBCHAPTER M

Revenue impact range (%)	Number of entities	Percent of entities
0 < 1	170	80.6
1 < 3	31	14.7
3 < 5	7	3.3
5 < 10	3	1.4
Above 10	0	0
Total	211	100

TABLE 14—ESTIMATED ANNUAL REVENUE IMPACT FOR SMALL ENTITIES UNDER 46 CFR SUBCHAPTER I

Revenue impact range (%)	Number of small entities	Percent of small entities
0 ≤ 1	1	100
1 ≤ 3	0	0
Above 3	0	0
Total	1	100

According to our analysis, 80.6 percent of subchapter M entities will have an annual impact to revenue of 1 percent or less. Approximately 14.7 percent will have an annual impact to revenue between 1 and 3 percent. The remaining 4.7 percent will have an annual impact to revenue greater than 3 percent. For subchapter I entities, our analysis shows a less than 1 percent impact to annual revenue for all small entities.

(5) A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

This final rule calls for no new reporting, recordkeeping, or other compliance requirements.

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

This final rule implements section 815 of CGAA 2018. The CGAA 2018 mandates the revision of towing vessel inspection user fees if there are differences in costs to the Government. As such, the Coast Guard has no discretion to offer alternatives that minimize the impact on small entities while accomplishing the stated objective of the statute.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Conclusion

In conclusion, we estimate that 80.6 percent of entities under 46 CFR subchapter M with revenue data will have an annual impact to revenue of 1 percent or less. Approximately 14.7 percent will have an annual impact to revenue between 1 and 3 percent. The remaining 4.7 percent will have an annual impact to revenue greater than 3 percent. For entities under 46 CFR subchapter I, our analysis shows a less than 1 percent impact to annual revenue for all small entities. We also discussed several regulatory alternatives, including our preferred alternative. Our preferred alternative is to: (1) update the user fee for seagoing towing vessels; (2) revise the user fee for other inspected towing vessels; and (3) establish fees for towing vessels using the ACP, SIP, or TSMS options. Owners and operators of vessels using the ACP, SIP, or TSMS option will pay a lower fee than owners and operators of vessels that use the traditional Coast Guard inspection option.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we offer to assist small entities in understanding this final rule so that they can better evaluate its effects on them and participate in the rulemaking. The Coast Guard will not retaliate against small entities that question or complain about this final rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

D. Collection of Information

This final rule calls for no new or revised collection of information under

the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

E. Federalism

A rule has implications for federalism under Executive Order 13132 (Federalism) if it has a substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under Executive Order 13132 and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132. Our analysis follows.

It is well settled that States may not regulate in categories reserved for regulation by the Coast Guard. It is also well settled that all of the categories covered in 46 U.S.C. 3306, 3703, 7101, and 8101 (design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels), as well as the reporting of casualties and any other category in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, are within the field foreclosed from regulation by the States. *See* the Supreme Court's decision in *United States* v. *Locke* and *Intertanko* v. *Locke,* 529 U.S. 89, 120 S.Ct. 1135 (2000). Therefore, because the States may not regulate within these categories, this rule is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

F. Unfunded Mandates

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Although this final rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This final rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights).

H. Civil Justice Reform

This final rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform) to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this final rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This final rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Indian Tribal Governments

This final rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

K. Energy Effects

We have analyzed this final rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (for example, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this final rule under Department of Homeland Security Management Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. This final rule is categorically excluded under paragraphs L54 and L57 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev 1.[32] Paragraph L54 pertains to regulations that are editorial or procedural. Paragraph L57 pertains to regulations concerning manning, documentation, admeasurement, inspection, and equipping of vessels.

This final rule updates the existing user fee for seagoing towing vessels that are 300 gross tons or more and establishes specific user fees for other towing vessels that have more recently become subject to inspection.

List of Subjects in 46 CFR Part 2

Marine safety, Reporting and recordkeeping requirements, Vessels.

For the reasons discussed in the preamble, the Coast Guard amends 46 CFR part 2 as follows:

PART 2—VESSEL INSPECTIONS

■ 1. The authority citation for part 2 is revised to read as follows:

Authority: Sec. 622, Pub. L. 111–281; 33 U.S.C. 1903; 43 U.S.C. 1333; 46 U.S.C. 2103, 2110, 3306, 3703, 70034; DHS Delegation No. 00170.1, Revision No. 01.3, paragraph (II)(77), (90), (92)(a), (92)(b); E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277, sec. 1–105.

■ 2. Amend § 2.10–25 by:
■ a. Revising the definition of ''*Seagoing towing vessel*''*;* and
■ b. Adding the definitions in alphabetical order for ''*Alternative Compliance Program option*'', ''*Annual vessel inspection fee*'', ''*Coast Guard option*'', ''*Streamlined Inspection Program option*'', ''*Towing Safety Management System option*'', and ''*Towing vessel*''.

[32] *https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf* (accessed July 10, 2023).

The additions and revision read as follows:

§ 2.10–25 Definitions.

* * * * *

Alternative Compliance Program option means the option described in 46 CFR part 8, subpart D.

Annual vessel inspection fee means the fee charged for inspection and related services provided by the Coast Guard to determine whether a vessel meets the requirements to maintain its Certificate of Inspection.

Coast Guard option means an option used by—

(1) A vessel inspected under a 46 CFR subchapter that is not participating in the Alternative Compliance Program described in 46 CFR part 8, subpart D;

(2) A vessel inspected under a 46 CFR subchapter that is not participating in the Streamlined Inspection Program described in 46 CFR part 8, subpart E; or

(3) A vessel inspected under 46 CFR subchapter M that is not participating in the Towing Safety Management System option described in 46 CFR part 138.

* * * * *

Seagoing towing vessel means a commercial vessel 300 gross tons or more engaged in or intending to engage in the service of pulling, pushing, or hauling alongside, or any combination of pulling, pushing, or hauling alongside, and that makes voyages beyond the Boundary Line as defined by 46 U.S.C. 103, and has been issued a Certificate of Inspection under the provisions of subchapter I of this chapter.

* * * * *

Streamlined Inspection Program option means the option described in 46 CFR part 8, subpart E.

* * * * *

Towing Safety Management System option means the option described in 46 CFR part 138 for towing vessels subject to 46 CFR subchapter M.

Towing vessel means a commercial vessel engaged in or intending to engage in the service of pulling, pushing, or hauling alongside, or any combination of pulling, pushing, or hauling alongside.

* * * * *

■ 3. Amend § 2.10–101, in Table 2.10–101, by:

■ a. Revising the ''Sea-going Towing Vessels'' entry and, in order, adding the subentries ''Coast Guard option'', ''Alternative Compliance option'', and ''Streamlined Inspection Program option''; and

■ b. Adding an entry for ''Towing Vessels (Inspected under 46 CFR Subchapter M)'' and, in order, adding the subentries ''Coast Guard option'' and ''Towing Safety Management System option''.

The addition and revision read as follows:

§ 2.10–101 Annual vessel inspection fee.

* * * * *

TABLE 2.10–101—ANNUAL VESSEL INSPECTION FEES FOR U.S. AND FOREIGN VESSELS REQUIRING A CERTIFICATE OF INSPECTION

* * * * * * *	
Seagoing Towing Vessels (Inspected under 46 CFR Subchapter I):	
Coast Guard option	2,747
Alternative Compliance Program option	1,850
Streamlined Inspection Program option	2,260
* * * * * * *	
Towing Vessels (Inspected under 46 CFR Subchapter M):	
Coast Guard option	2,184
Towing Safety Management System option	973
* * * * * * *	

* * * * *

Dated: December 18, 2023.

W.R. Arguin,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Prevention Policy.

[FR Doc. 2023–28112 Filed 12–27–23; 8:45 am]

BILLING CODE 9110–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket Nos. 22–301, 23–159; FCC 23–34; FR ID 191170]

Review of the Commission's Assessment and Collection of Regulatory Fees; Assessment and Collection of Regulatory Fees for Fiscal Year 2023

AGENCY: Federal Communications Commission.

ACTION: Final action.

SUMMARY: In this document, the Federal Communications Commission (Commission) amends its rules to simplify and streamline the Commission's procedures for filing waiver, deferral, and reduction requests for regulatory fees and the procedures for filing installment payment requests for all debt owed to the Commission, including regulatory fees, to reduce administrative expenses and ensure more rapid disposition of such requests.

DATES: The revision to the Commission's waiver procedure, 47 CFR 1.1166, became effective on October 16, 2023. The revision to 47 CFR 1.1914 is delayed indefinitely until after review by the Office of Management and Budget (OMB), as required by the Paperwork Reduction Act.

FOR FURTHER INFORMATION CONTACT: Roland Helvajian, Office of Managing Director, at (202) 418–0444.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (*May Report and Order*), in MD Docket Nos. 22–301 and 23–159, FCC 23–34, adopted on May 12, 2023, and released on May 15, 2023, as amended by the *sua sponte* technical corrections the Commission made to the language of 47 CFR 1.1166 and 1.1914 in the Commission's Report and Order, FCC 23–66, MD Docket Nos. 22–310 and 23–159, adopted and released on August 10, 2023 (August Report and Order), 88 FR 63694, (Sept. 15, 2023). The full text of the Commission's May Report and Order and August Report and Order are available for public inspection by downloading the text from the Commission's website at *https://www.fcc.gov/licensing-databases/fees/regulatory-fees.*

I. Administrative Matters

A. Final Paperwork Reduction Act of 1995 Analysis

1. The Commission adopted amendments to 47 CFR 1.1166 and

1.1914 in the May Report and Order, and made technical corrections to the language of those rules in the August Report and Order, which may contain new or substantively modified information collection requirements subject to the PRA and new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). The amendments to 47 CFR 1.1166, as adopted in the May Report and Order, and as technically corrected in the August Report and Order, were approved by OMB on August 17, 2023, pursuant to the Paperwork Reduction Act, as non-substantive modifications to an information collection under the PRA. The effective date of the amended 47 CFR 1.1166 was October 16, 2023, which was 30 days after it was published in the **Federal Register** on September 15, 2023. The amendments to 47 CFR 1.1914 will not become effective until 30 days after publication of a document in the **Federal Register** announcing that the Office of Management and Budget has completed review of any information collection requirements that the Office of Managing Director determines are required under the Paperwork Reduction Act. The Commission will publish a document in the **Federal Register** announcing the effective date of the revisions to 47 CFR 1.1914.

B. Congressional Review Act

2. The Commission will not send a copy of the May Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), because the adopted rule is a rule of agency organization, procedure, or practice that does not ''substantially affect the right or obligations of non-agency parties.''

II. Discussion

3. In the May Report and Order, the Commission codified several of the temporary measures it had implemented in FY 2020 through FY 2022 to permanently simplify and streamline the process for filing waiver, deferral, and reduction requests for regulatory fees and the process for filing installment payment requests for all debt owed to the Commission, including regulatory fee debt. Specifically, it amended 47 CFR 1.1166 and 1.1914 as follows: (i) parties seeking multiple forms of regulatory fee relief, including installment payment of their regulatory fees, may file a single pleading in which all requested relief is included; (ii) parties must submit their requests electronically to *regfeerelief@fcc.gov;* and (iii) parties seeking only installment payment relief to pay debt owed to the Commission, including regulatory fee debt, must submit such requests in writing, electronically to *regfeerelief@fcc.gov.* The Commission received many more requests for waiver, reduction, deferral, and installment payment relief in FYs 2020, 2021, and 2022 than it had received in previous years. As in other years, many of the requests were submitted by regulatory fee payors without the assistance of counsel. The Commission found that the procedural flexibility used during this time eased the Commission's administrative burden and thereby reduced administrative expenses of collection. The Commission made these changes without notice and comment because they are rules of agency organization, procedure, or practice exempt from the general notice-and-comment requirements of the Administrative Procedure Act.

4. On August 10, 2023, the Commission adopted the August Report and Order, which included *sua sponte* technical corrections to the amended language of 47 CFR 1.1166 and 1.1914. Specifically, the Commission deleted ''or installment payment'' in the introductory paragraph of 47 CFR 1.1166 and in 47 CFR 1.1166(a), made grammatical changes to move the word ''or'' twice, and deleted ''and 1.1914'' in 47 CFR 1.1166(a). The Commission also restored the following text (bolded) that was inadvertently deleted from 47 CFR 1.1166(a) in the May Report and Order: ''All requests for waiver, reduction and deferral shall be acted upon by the Managing Director with the concurrence of the General Counsel.'' The Commission also (1) modified the heading of section 1.1166 to delete ''and installment payment'' and to add ''and'' before the word ''deferrals''; (2) revised the final sentence of the introductory paragraph of section 1.1166 to delete the phrase ''interest charges or penalties''; and (3) revised section 1.1166(b) to delete a comma and the phrase ''from the date of the filing of the deferral request''.

5. The Commission also made technical corrections to 47 CFR 1.1914 to clarify the language of the rule. Specifically, the third sentence of 47 CFR 1.1914(a) was revised to read as follows: ''Requests for installment payment of non-regulatory fee debt shall be filed electronically, by submission to the following email address: *installmentplanrequest@fcc.gov*.'' The Commission explained that it made this change to ensure that, for administrative simplicity purposes, installment payment requests that are non-regulatory fee in nature are submitted to a different email address than the email address to which all regulatory fee relief requests, including for installment payment of regulatory fees, are to be submitted. The Commission also revised the fourth sentence of 47 CFR 1.1914(a) to more clearly state that requests for installment payment of regulatory fees may be combined with other regulatory fee relief requests that are filed pursuant to 47 CFR 1.1166. Additionally, the Commission revised the fifth sentence of section 1.1914(a) to delete the phrase ''their debt to the Commission.'' Further, the Commission stated that the amendments to 47 CFR 1.1914 in the May Report and Order will continue as temporary measures until such time as they become effective.

6. On August 17, 2023, OMB approved the amendments to 47 CFR 1.1166, including the technical language corrections the Commission made in the August Report and Order. On September 15, 2023, the August Report and Order was published in the **Federal Register**, including 47 CFR 1.1166 and 1.1914, as fully amended and technically corrected. The effective date of 47 CFR 1.1166 was October 16, 2023, which was 30 days after it was published in the **Federal Register**. The Commission will publish a document in the **Federal Register** to announce the effective date for the revisions to 47 CFR 1.1914, once OMB has approved the rule.

III. Ordering Clauses

7. Accordingly, *it is ordered that,* pursuant to sections 4(i), 4(j), 9, 9A, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 159, 159a, 303(r), this May Report and Order is hereby adopted.

8. *It is further ordered that* the amendments to section 1.1914 of the Commission's rules, 47 CFR 1.1914, which were technically corrected by the Commission on August 10, 2023, WILL BECOME EFFECTIVE 30 days after publication of a document in the **Federal Register** announcing that the Office of Management and Budget has completed review of any information collection requirements that the Office of Managing Director determines as required under the Paperwork Reduction Act. The Commission will publish a document in the **Federal Register** announcing the effective date of the amendments to 47 CFR 1.1914. The amendments to section 1.1166 of the Commission's rules, 47 CFR 1.1166, which were technically corrected by the Commission on August 10, 2023, and approved by the Office of Management and Budget, pursuant to the Paperwork

Reduction Act, on August 17, 2023, became effective on October 16, 2023.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2023–28617 Filed 12–27–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 74

[MB Docket No. 03–185; FCC 23–58; FR ID 192560]

Digital Low Power Television and Television Translator Stations

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Federal Communications Commission (Commission) announces that the Office of Management and Budget (OMB) has approved the information collection requirements associated with the Commission's rules in a Report and Order which adopts rules to clarify for all stakeholders the status of LPTV FM6 service and codify that these services may be provided by a group of 14 existing FM6 stations, and only by those stations. This document is consistent with the Commission's Report and Order, which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of those rules.

DATES: The amendments to 47 CFR 74.790(o)(9) and (10) are published at 88 FR 59455, August 29, 2023, are effective as of December 28, 2023, except for the portion of OMB Control No. 3060–0386 that approves the one-time requirement that FM6 LPTV stations notify the Media Bureau via letter filing as to whether they will continue FM6 operations and confirm their precise FM6 operational parameters. We establish January 29, 2024 as the deadline for filing this notification with the Bureau.

FOR FURTHER INFORMATION CONTACT: Shaun Maher, Video Division, Media Bureau at (202) 418–2324 or, Mark Colombo, Video Division, Media Bureau at (202) 418–7611 or *Mark.Colombo@fcc.gov*. For additional information concerning the Paperwork Reduction Act (PRA) information collection requirements contained in this document, contact Cathy Williams at 202–418–2918, or *Cathy.Williams@fcc.gov*.

SUPPLEMENTARY INFORMATION: This document announces that, on December 5, 2023, OMB approved the information collection requirements contained in §§ 74.790(o)(9) and 74.790(o)(10) of the Commission's rules. The OMB Control Numbers are 3060–0110, 3060–0214, and 3060–0386. The Commission publishes this document as an announcement of the effective date of these rules. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Cathy Williams, Federal Communications Commission, Room 3–317, 45 L Street NE, Washington, DC 20554. Please include the OMB Control Number, 3060–0110, or 3060–0214, or 3060–0386, in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov*.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received final OMB approval on December 5, 2023, for the information collection requirements contained in §§ 74.790(o)(9) and 74.790(o)(10) of the Commission's rules.

Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–0110.

OMB Approval Date: December 5, 2023.

OMB Expiration Date: December 31, 2026.

Title: FCC Form 2100, Application for Renewal of Broadcast Station License, LMS Schedule 303–S.

Form Number: FCC 2100, LMS Schedule 303–S.

Respondents: Business or other for-profit entities; Not for profit institutions; State, Local or Tribal Governments.

Number of Respondents and Responses: 5,140 respondents, 5,140 responses.

Estimated Time per Response: 0.5 hours-12 hours.

Frequency of Response: On occasion reporting requirement; Every eight-year reporting requirement; Third party disclosure requirement.

Total Annual Burden: 14,868 hours.

Total Annual Costs: $3,994,164.

Obligation of Response: Required to obtain or retain benefits. The statutory authority for the collection is contained sections 154(i), 303, 307 and 308 of the Communications Act of 1934, as amended, and section 204 of the Telecommunications Act of 1996.

Needs and Uses: On July 20, 2023, the Commission adopted Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations, Fifth Report and Order, FCC 23–58 (rel. July 20, 2023) (FM6 Report and Order). The Commission adopted a new requirement that FM6 LPTV stations certify in their license renewal application that they have continued to provide FM6 operations in accordance with the FM6 rules during their prior license term. The Commission delegated authority to the Media Bureau to determine the most appropriate means for these stations to make such certification, be it by an attachment to the renewal application or some other reasonable means. This requirement is contained in 47 CFR 74.790(o)(10).

This submission is being made to the Office of Management and Budget (OMB) for approval of the renewal certification requirement for FM6 LPTV stations as adopted in the FM6 Report and Order. Since the certification will be included as an additional exhibit to the existing form, it did not necessitate changes to LMS Form 2100 Schedule 303–S.

OMB Control Number: 3060–0214.

OMB Approval Date: December 5, 2023.

OMB Expiration Date: December 31, 2026.

Title: Sections 73.3526 and 73.3527, Local Public Inspection Files; Sections 73.1212, 76.1701 and 73.1943, Political Files.

Form Number: N/A.

Respondents: Business or other for profit entities; Not for profit institutions; State, Local or Tribal government; Individuals or households.

Number of Respondents: 23,819 respondents; 66,392 responses.

Estimated Time per Response: 1–52 hours.

Frequency of Response: On occasion reporting requirement, Recordkeeping requirement, Third party disclosure requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for these collections is contained in sections 151, 152, 154(i), 303, 307, 308, and 315 of the Communications Act of 1934, as amended.

Total Annual Burden: 2,065,841 hours.

Total Annual Cost: No cost.

Needs and Uses: On July 20, 2023, the Commission adopted Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations, Fifth Report and Order, FCC 23–58 (rel. July 20, 2023) (FM6 Report and Order). The Commission adopted a new requirement that FM6 LPTV stations maintain a public inspection file similar to the requirement in the rule for FM radio stations. This submission is being made to the Office of Management and Budget (OMB) for approval of the local public inspection file requirement for FM6 LPTV stations as adopted in the FM6 Report and Order. This requirement is contained in 47 CFR 73.3526.

OMB Control No.: 3060–0386.

Title: Special Temporary Authorization (STA) Requests; Notifications; and Informal Filings; Sections 1.5, 73.1615, 73.1635, 73.1740 and 73.3598; CDBS Informal Forms; Section 74.788; Low Power Television, TV Translator and Class A Television Digital Transition Notifications; Section 73.3700(b)(5), Post Auction Licensing; Section 73.3700(f).

Form No.: None.

Respondents: Business or other for-profit entities; Not for profit institutions; State, local or Tribal government.

Number of Respondents and Responses: 5,537 respondents and 5,537 responses.

Estimated Time per Response: 0.50–4.0 hours.

Frequency of Response: One-time reporting requirement and on occasion reporting requirement.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 151, 154(i), 157 and 309(j) as amended; Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96, 6402 (codified at 47 U.S.C. 309(j)(8)(G)), 6403 (codified at 47 U.S.C. 1452), 126 Stat. 156 (2012) (Spectrum Act); and sections 1, 4(i) and (j), 7, 301, 302, 303, 307, 308, 309, 312, 316, 318, 319, 324, 325, 336, and 337 of the Communications Act of 1934, as amended.

Total Annual Burden: 4,353 hours.

Annual Cost Burden: $1,834,210.

Needs and Uses: On July 20, 2023, the Commission adopted Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations, Fifth Report and Order, FCC 23–58 (rel. July 20, 2023) (FM6 Report and Order). The Commission adopted a one-time requirement that FM6 LPTV stations notify the Media Bureau via letter filing as to whether they will continue FM6 operations and confirm their precise FM6 operational parameters. In addition, in the FM6 Report and Order, the Commission adopted a rule, 47 CFR 74.790(o)(9) that requires FM6 LPTV stations that are permanently discontinuing their FM6 operations to notify the Commission pursuant to section 73.1750 of the rules. This submission is being made to the Office of Management and Budget (OMB) for approval of the one-time letter notification and discontinuation of operations notification requirements for FM6 LPTV stations as adopted in the FM6 Report and Order.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2023–28618 Filed 12–27–23; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2018–0043; FF09E21000 FXES1111090FEDR 245]

RIN 1018–BD13

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Black-Capped Petrel

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered species status under the Endangered Species Act of 1973 (Act), as amended, for the black-capped petrel (*Pterodroma hasitata*), a pelagic seabird species that nests on the island of Hispaniola and spends the rest of its life at sea. The species forages in high concentration off the coast of North Carolina; however, the marine range extends across much of the western Atlantic (Nova Scotia to Venezuela) and into the Caribbean Sea and northern Gulf of Mexico. This rule extends the protections of the Act to the black-capped petrel.

DATES: This rule is effective January 29, 2024.

ADDRESSES: This final rule is available on the internet at *https://www.regulations.gov*. Comments and materials we received are available for public inspection at *https://www.regulations.gov at* Docket No. FWS–R4–ES–2018–0043.

Supporting materials we used in preparing this rule, such as the species status assessment report, are available at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2018–0043.

FOR FURTHER INFORMATION CONTACT: José Cruz-Burgos, Fish and Wildlife Biologist, U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office; email: *caribbean_es@fws.gov*; telephone: 786–244–0081. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act (16 U.S.C. 1531 *et seq.*), a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the black-capped petrel meets the Act's definition of an endangered species; therefore, we are listing it as such. Listing a species as an endangered or threatened species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. This rule lists the black-capped petrel (*Pterodroma hasitata*) as an endangered species under the Act.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the black-capped petrel is an endangered species due to the following threats: habitat loss due to deforestation and forest fires (Factor A) and predation by nonnative mammals (Factor C). Other factors that affect the species now to a lesser degree or could affect the species in the future include development (Factor A), offshore oil and gas infrastructure and activities (Factor E), offshore and coastal wind energy infrastructure and activities (Factor E), collisions with communication towers (Factor E), and disorientation and grounding due to artificial lighting (Factor E). The effects of climate change are also expected to affect the species through increased storm intensity and frequency, resulting in flooding of burrows and erosion of suitable nesting habitat (Factor E). Historically, human predation for consumption (Factor B) and natural disasters (Factor E), such as earthquakes and volcanic eruptions, affected the viability of the species.

Previous Federal Actions

On October 9, 2018, we published in the **Federal Register** (83 FR 50560) a proposed rule to list the black-capped petrel as a threatened species with a rule issued under section 4(d) of the Act. Please refer to that proposed rule for a detailed description of previous Federal actions concerning this species.

On May 2, 2023, we published in the **Federal Register** (88 FR 27427) a document reopening the comment period on the October 9, 2018, proposed rule as a result of significant new information we received after the publication of the 2018 proposal that is relevant to our consideration of the status of the black-capped petrel. That document described the new information and requested comments on it, as well as on all other aspects of our proposal to list the black-capped petrel.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the black-capped petrel. The SSA team was composed of Service biologists, in consultation with other black-capped petrel experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the 2018 black-capped petrel SSA report. We sent the 2018 SSA report to three independent peer reviewers and received responses from all three; we incorporated the results of that review into the SSA report, as appropriate. More recently, we solicited independent scientific review of the 2023 black-capped petrel SSA report. We sent the 2023 SSA report to five peer reviewers and received responses from three; we incorporated the results of the peer review into the 2023 SSA report, as appropriate. The peer reviews can be found at *https://www.regulations.gov*. In preparing the proposed rule and this final rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which was the foundation for the proposed rule (version 1.1, Service 2018) and this final rule (version 1.3, Service 2023).

Summary of Changes From the Proposed Rule

We considered all relevant substantive comments we received on the October 9, 2018, proposed rule, and we incorporate new information into this final rule that was not available when the proposed rule published. We discussed the new information in the document we published on May 2, 2023 (88 FR 27427); that document made the new information available to the public and reopened the comment period on the proposed listing of the black-capped petrel.

After reviewing the new information we made available in the document we published on May 2, 2023 (88 FR 27427), we have determined that the black-capped petrel meets the Act's definition of an endangered species. Information provided during the public comment periods on the October 9, 2018, proposed rule and new science made available after the proposal's publication in 2018 provided additional data that were analyzed and considered in the updated SSA report (version 1.3, Service 2023). The new information demonstrates that the threats acting on the species are more imminent, thus indicating a lower overall viability, *i.e.,* current condition, of the species.

Updated habitat suitability models indicate there is 70 percent less available nesting habitat than was calculated for the October 9, 2018, proposed rule (Satgé et al. 2021, entire). Additionally, the loss of primary forests on Haiti is accelerating at a greater rate than previously described (Hedges et al. 2018, entire).

In this rule, we also provide updated information on the conditions of nesting areas on Hispaniola and the more rapid declines in nesting activity and reproductive success than were described in the October 9, 2018, proposed rule. Further, we present information that shows the nesting population of the Pic Macaya, Haiti, area is now extirpated.

We have new information on the threats acting on the species on Hispaniola, including more documented occurrences of predation by nonnative species; impending development near Pedernales, Dominican Republic; and terrestrial mining of rare earth minerals (Service 2023, pp. 60–61). These threats are contributing to a reduction in the resiliency of the nesting populations on Hispaniola.

New information gathered and evaluated since the publication of the October 9, 2018, proposed rule includes confirmed occurrences of black-capped petrels in the northern Gulf of Mexico, which extends the known range to include the northern Gulf of Mexico (Jodice et al. 2021, entire). In addition, recent records of individual black-capped petrels in the central and northeastern Gulf of Mexico show greater use of this marine region by the species than was previously documented, resulting in a larger range than previously described (Jodice et al. 2021, entire). Further, recent satellite tracking studies of individual black-capped petrels identified near-shore areas off the northern coast of Central and South America as areas where the species forages during the breeding season, and these areas may have previously been overlooked or underestimated (Leopold et al. 2019, entire).

Additionally, in the October 9, 2018, proposed listing rule, we determined the designation of critical habitat for the species to be not prudent. After considering public comments we received, new information on the threats acting on the black-capped petrel at sea, and our regulations at 50 CFR 424.12(a) regarding when the Secretary of the Interior (Secretary) may, but is not required to, determine that a critical habitat designation would not be

prudent (see 84 FR 45020; August 27, 2019), we now find that designating critical habitat for the black-capped petrel is prudent, but not determinable at this time. Critical habitat is not determinable because the data sufficient to perform the required consideration of economic impacts are lacking at this time.

Finally, since we are listing the black-capped petrel as an endangered species, the rulemaking process to establish regulations that are necessary and advisable to provide for the conservation of a threatened species under section 4(d) of the Act no longer applies. When a species is listed as an endangered species, protections are automatically extended to that species under section 9 of the Act.

Summary of Comments and Recommendations

In our October 9, 2018, proposed rule (83 FR 50560), we requested that all interested parties submit written comments on the proposal by December 10, 2018. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the Primera Hora (Puerto Rico), and Virginia Pilot (Virginia-Carolinas). We did not receive any requests for a public hearing. Later, on May 2, 2023, we published in the **Federal Register** (88 FR 27427) a document reopening the proposed rule's comment period and providing new information received since the publication of the proposed rule. We published this document to allow the public the opportunity to review the new information and provide comments prior to our final determination on the proposed action. We requested comments to be submitted on the new information by June 1, 2023. All substantive information received during both comment periods has been incorporated directly into the SSA report or this final determination, or is addressed below.

Peer Reviewer Comments

As discussed above under Peer Review, peer reviewer comments were incorporated into version 1.1 of the SSA report as appropriate, which served as the foundation for the October 9, 2018, proposed rule (83 FR 50560).

After revising version 1.1 of the SSA report to include new information, we provided version 1.3 of the SSA report to five independent peer reviewers and received responses from three. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the information contained in version 1.3 of the SSA report.

The peer reviewers generally concurred with our methods and conclusions and provided support for thorough and descriptive narratives of assessed issues, additional information, clarifications, and suggestions to improve the final SSA report. Peer reviewer comments are incorporated into version 1.3 of the SSA report (Service 2023, entire) and addressed below.

(1) Comment: One peer reviewer provided input regarding an increased risk from activities associated with offshore wind energy development in the Central Atlantic, as more areas have been proposed for offshore wind energy development. The peer reviewer stated there are several areas off the coast of North Carolina and Virginia, if developed, that would pose substantial collision risks to the petrels that may use this area outside the breeding season.

Our response: Impacts of wind energy development and infrastructure were included in the SSA report (version 1.3, Service 2023) and considered in the evaluation for this final listing rule.

(2) Comment: One peer reviewer sought clarification regarding the definition of the exclusive economic zone (EEZ) and noted that Federal jurisdiction does not extend beyond the EEZ.

Our response: The U.S. EEZ includes waters that are no more than 200 nautical miles (nmi) (370.4 km) from the territorial sea baseline; it begins at the 12 nmi (22.2 km) territorial sea of the U.S., its Territories, and Commonwealths. U.S. jurisdiction to manage resources is within the EEZ but does not extend beyond the 200 nmi border. However, under Section 9 of the Act (codified at 50 CFR 17.21), it is unlawful for any person subject to the jurisdiction of the United States to (A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; and (C) *take any such species upon the high seas* (emphasis added). Therefore, while U.S. jurisdiction to manage resources extends only to the edge of the U.S. EEZ, the Act's prohibition of take applies to any person subject to the jurisdiction of the U.S. on the high seas.

(3) Comment: One peer reviewer noted that the impacts to black-capped petrels by a large oil spill in the Gulf of Mexico would be difficult to document, such as in the case of the Deepwater Horizon spill in 2010. If petrels expired at sea, oceanic currents, tidal regimes, and wind regimes would make shoreline deposition and carcass detection difficult.

Our response: We recognize the difficulty of recovering and documenting animals in the offshore environment due to variable environmental and oceanographic influences. With the black-capped petrel's range now including a portion of the northern Gulf of Mexico, the risk of an accidental oil spill affecting the species is dependent on the amount of offshore petroleum structures and activities. The effects of an accidental oil spill depend on the timing of the spill, location of the spill, type of product spilled, and amount of product spilled. The severity and magnitude of the effects of accidental oil spills on the black-capped petrel cannot be quantified for this assessment due to the variable nature of each spill event. Accidental oil spills can be catastrophic but are not considered a persistent threat acting on the species due to the variable nature of an individual spill. In version 1.3 of the SSA report, we address the potential impact to the species from contact with oil and include a discussion of the species' overlap with the Deepwater Horizon oil spill's footprint in the northern Gulf of Mexico (Service 2023, pp. 29–30). We also include the information provided by the commenter in version 1.3 of the SSA report (Service 2023, pp. 29–30).

(4) Comment: One peer reviewer noted that the marine fisheries section in the SSA report seems to focus on mortality to petrels from fisheries, but asked why there was not a discussion about a reduction in or change of prey due to fisheries. They noted that this has been documented for the Hawaiian petrel (*Pterodroma sandwichensis*) (Wiley et al. 2013, entire).

Our response: While the Hawaiian petrel and black-capped petrel are congeners and may share similar responses to environmental changes, the best available information does not indicate that there is prey reduction or a change in prey due to fisheries in the black-capped petrel's range.

(5) Comment: One peer reviewer suggested we include information indicating it is likely the species breeds in Dominica and possibly in Guadeloupe.

Our response: We recognize the potential for the species to breed on Dominica and Guadeloupe, and we are aware of ongoing surveys to determine the species' occurrence on additional Caribbean islands other than Hispaniola. At this time, however, there

is no confirmed evidence the black-capped petrel is nesting on Dominica or Guadeloupe, and the species is considered extirpated on both islands.

Comments From States on the Proposed Rule

(6) Comment: The North Carolina Wildlife Resources Commission (NCWRC) offered collaboration opportunities for data and support if the species is listed. The agency also noted the importance to the species of the offshore areas between Cape Lookout and Nags Head, North Carolina, with peaks in usage during the spring and fall.

Our response: We value our partnerships and continued cooperation with State agencies to improve the science and recovery of listed species. The information regarding the area of high concentration for foraging off the coast of North Carolina is included in the SSA report describing the marine habitat of the black-capped petrel (Service 2023, pp. 4–8). The report emphasizes the importance of this area off the eastern United States for black-capped petrel foraging.

Public Comments

(7) Comment: Two commenters requested justification for the threatened status when black-capped petrel abundance is much lower than several similar species that were listed as endangered species, such as the Hawaiian petrel, band-rumped storm-petrel (*Hydrobates castro*), Bermuda petrel (*Pterodroma cahow*; listed with the common name ''cahow''), and whooping crane (*Grus americana*).

Our response: Determinations of whether or not a species warrants listing as an endangered or a threatened species under the Act are species-specific. They are based on the best available science, after considering the species' life history and the factors listed in section 4(a)(1) of the Act that may impact the species as well as how the species may respond to those factors. Accordingly, we can reach different determinations for similar species, depending on the circumstances. However, after review of new information, we have determined that the black-capped petrel meets the Act's definition of an endangered species.

(8) Comment: One commenter noted that species' representation was described in the SSA report, version 1.1, as having a 43 percent reduction in geographic representation. The commenter provided information that densities of nests are much lower today than historically and that change in density should be factored into the current condition analysis.

Our response: We did not consider nest densities in the representation analysis, but we applied the available information regarding nest densities in our analysis of the species' resiliency. We assessed representation as the limited current distribution on a single island compared to historically, when the species was geographically represented more broadly across at least three other islands in the Caribbean (Dominica, Guadeloupe, and Martinique) (Service 2023, pp. 53–61).

(9) Comment: Several commenters stated that the Service did not consider current threats related to major shipping lanes that overlap with the species' foraging habitat, which currently exposes individuals to the presence of contaminants from the shipping industry (Halpern et al. 2008, entire).

Our response: We discuss the effects of certain contaminants under *Offshore Oil and Gas* on black-capped petrel below, however, we did not specifically identify contaminants from the shipping industry as a threat to the species. Future updates to the SSA report could include this factor if more information becomes available.

(10) Comment: One commenter noted information in the proposed rule described the species' specific needs and preferences for the offshore habitat elements as relatively flexible, plentiful, and widely distributed, and as stated there are no habitat-based threats to the species in the foraging range. The commenter was concerned the importance of specific areas in the offshore range was not recognized. They noted that the SSA report mentions that the offshore region from southern Florida to Cape Hatteras, North Carolina, is the only marine area where regular and sizable concentrations of the species occur. They add that Simons et al. (2013, p. S23) specify that ''apparently most of the world's population of black-capped petrels forages off the coast of the southeastern [United States], making this area important for the survival of the species.'' The commenter notes that other possible concentrations do not diminish the importance of the foraging area off the southeastern United States.

Our response: We did not intend to diminish the importance of the species' foraging area off the southeastern United States. We recognize the importance of this area for prey and foraging. We describe a core foraging area along the outer continental shelf off Cape Hatteras, North Carolina, where there is a steep shelf that contributes to nutrient-rich waters from upwelling that contain a concentration of prey. While this is the primary foraging area of the species, this is not the only area where the species forages, as black-capped petrels have been found in waters off the eastern coast of North America from latitude 40° N (approximately New Jersey) south to latitude 10° N (approximately northern South America). Additionally, new information associated with the species' occurrence at sea indicates an expansion of the species' range within the northern Gulf of Mexico.

(11) Comment: One commenter noted the proposed rule states that the impact of terrestrial wind farms on nesting petrels is unquantified. The commenter indicated that while there are problems with quantifying the impacts of terrestrial wind farms, the impact on nesting petrels has been quantified. They provided the example of multiple terrestrial wind energy habitat conservation plans in Hawaii where the Service participated in quantifying the numbers of nesting Hawaiian petrels and Newell's shearwaters (*Puffinus newelli*) allowed to be taken by incidental take permits.

Our response: We have included the information regarding impacts from wind energy on the Hawaiian petrel in the SSA report (Service 2023, p. 26) and considered the relevant information in our analyses presented in this final rule.

(12) Comment: One commenter mentioned that entities under U.S. jurisdiction (*i.e.,* Texas Petroleum Company for Chevron Texaco Petroleum Company) use the high seas and the southern Caribbean waters (such as Colombia) for oil extraction. The commenter questioned whether regulations implementing the Act apply in the U.S. EEZ.

Our response: Presidential Proclamation 5030 (48 FR 10605; March 14, 1983) from 1983 defines the United States' jurisdictional waters as the EEZ of the United States. The EEZ Proclamation confirms U.S. sovereign rights and control over the living and non-living natural resources of the seabed, subsoil and superjacent waters beyond the territorial sea but within 200 nautical miles of the United States coasts. NOAA's Office of Coast Survey, U.S. Maritime Limits and Boundaries website provides a detailed description (NOAA 2023, entire). The northern portion of the Gulf of Mexico is within U.S. jurisdiction; however, the southern Gulf of Mexico and the high seas are outside of that EEZ boundary. The protections of the Act apply in the EEZ, with the Service responsible for the management of bird species within U.S. jurisdiction, including the U.S. EEZ.

Additionally, the prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take endangered wildlife within the United States or on the high seas.

(13) Comment: One commenter expressed concern that we did not include a description of survival of the different life stages of the black-capped petrel, including juveniles and immature petrels. They describe the survival of younger birds at sea as being lower in the first few years of life.

Our response: We were unable to quantify or describe the species' survival at sea based on age and concur with the commenters statement that younger seabirds in general do have a lower survival at sea than mature birds due to lack of foraging experience (Beauchamp 2022, entire). We did represent survival of the age classes in the nest success and nesting survival rate (Service 2023, p. 13).

(14) Comment: One commenter requested clarification regarding the age of maturity and generation times that were used in the SSA report. They expressed concern that our description of 5 years to maturity contradicts other papers that provide a range of 5 to 8 years. The commenter asserted that the age of maturity and generation times vary among sources and that these nuances are not discussed in the proposed rule.

Our response: We describe the age of sexual maturity, or first breeding, for black-capped petrels at 5 to 8 years based on the best available science (Goetz et al. 2012, p. 5; Simons et al. 2013, p. S22; Service 2023, p. 52). This is consistent with information that describes the age of sexual maturity is 5.3 years for the order Procellariiformes, in general (Hamer et al. 2002, p. 247).

I. Final Listing Determination

Background

A thorough review of the taxonomy, life history, and ecology of the black-capped petrel (*Pterodroma hasitata*) is presented in the SSA report (Service 2023, entire); available at *https://www.fws.gov/program/southeast-region and at https://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0043.

The black-capped petrel is a pelagic seabird that is in the order Procellariiformes, family Procellariidae. It is a medium-sized seabird in the *Pterodroma* or gadfly genus with long slender wings and markings of a black cap and dark mantle separated by a white collar. The wings are black or darker in color on the top surface as well as the edges of the underwing. Certain morphological characteristics may vary across the species with ''black-faced,'' ''white-face,'' and ''intermediate'' variations of the species having different plumage coloration and patterns (Howell and Patteson 2008, p. 70).

The estimated breeding population size for black-capped petrels is between 500 to 1,000 breeding pairs (Simons et al. 2013, p. S22; BirdLife International 2022, unpaginated). Petrels tend to maintain a strong relationship with their breeding grounds and return to the same nesting areas each year (Warham 1990, pp. 231–234). This site fidelity of nesting birds tends to isolate breeding populations and can influence genetic, behavioral, and morphological variation due to limited genetic exchange.

Black-capped petrels currently breed only in the highest elevations on the island of Hispaniola; recent nesting areas included three sites in Haiti (Pic Macaya, Pic La Visite, and Morne Vincent) and three sites in Dominican Republic (Sierra de Bahoruco/Loma del Toro, Valle Nuevo National Park, and Loma Quemada). The Pic Macaya site is likely extirpated. The Morne Vincent and Loma del Toro sites are physically contiguous areas and ecologically the same nesting area but are on different sides of the border between Haiti and Dominican Republic. In the proposed rule, the Loma Quemada site was included with the Loma de Toro site, as they are both within the Sierra de Bahoruco. Therefore, effectively, there are only four current active nesting sites. Historically, the species also nested in Martinique, Dominica, Guadeloupe, and, possibly, Cuba (Simons et al. 2013, pp. S11–S19). Currently, nearly 50 percent of the known nests are found within Parc National La Visite (Pic la Visite) in the Massif de la Selle mountain range in Haiti (Goetz et al. 2012, p. 5).

Based on recent habitat suitability modelling for the species, there are an estimated 563 square kilometers (km^2) (139,120 acres (ac)) of potentially suitable nesting habitat (suitability indices> 0.65) throughout Hispaniola, with only about 167 km^2 (41,267 ac) considered ''highly suitable'' with indices >0.9 (Satgé et al. 2021, p. 581)., The occupied area of currently known nest sites only includes approximately 2 km^2 (494 ac) of that highly suitable habitat (Wheeler et al. 2021, pp. 73–82).

Black-capped petrels spend most of their time at sea in the northwestern Atlantic. The at-sea geographic distribution (marine range) of the species includes waters off the eastern coast of North America from latitude 40° N (approximately New Jersey) south to latitude 10° N (approximately northern South America) and includes waters of the countries of Aruba, Bahamas, Bermuda, Bonaire, Canada, Colombia, Cuba, Curacao Caymans, Dominica, Dominican Republic, Guadeloupe, Guyana, Haiti, Jamaica, Nicaragua, Panama, St. Lucia, St. Vincent, Trinidad and Tobago, Turks and Caicos, United States, Venezuela and beyond to areas in the high seas (Goetz et al. 2012, p. 4; Jodice et al. 2015, entire). Off the eastern coast of the United States, petrels forage primarily in the Gulf Stream, from northern North Carolina to northern Florida, in areas of upwelling; off the coast of North Carolina, the species is most commonly observed offshore seaward from the western edge of the Gulf Stream and in areas of deeper waters. Near-shore waters off the northern coast of Central and South America also serve as foraging areas for some black-capped petrels during the breeding season (Jodice et al. 2015, pp. 26–27).

New information associated with the species' occurrence at sea indicates an expansion of the species' range within the northern Gulf of Mexico. Recent sightings of individual black-capped petrels in the central and northeastern Gulf of Mexico show greater use of this marine region by the species than previously documented, resulting in a confirmed range expansion (Jodice et al. 2021, entire). Additionally, recent satellite tracking studies of individual black-capped petrels identified near-shore areas off the northern coast of Central and South America as areas where the species forages during the breeding season, and these areas may have previously been overlooked or underestimated (Leopold et al. 2019, entire).

Black-capped petrels feed mostly at night and pick their food from the water surface either solitarily or in close proximity to other foraging seabird species. The diet of black-capped petrels is not fully understood; however, stomach content studies found squid, fish, crustaceans, and *Sargassum* or marine algae (Haney 1987, pp. 163–164; Simons et al. 2013, p. S30). The plant materials in the stomach suggest the species may forage around *Sargassum* mats, which tend to attract prey species and lead to the ingestion of the algae materials while the petrels feed on their preferred prey. The limited amount of algae found within digestive tracts further suggests that petrels may only be incidentally foraging at the *Sargassum* (Moser and Lee 1992, p. 67).

Black-capped petrels are ground-nesters that use existing cavities under rocks or vegetation in areas of high elevation (greater than or equal to 1,500 meters (4,921 feet)). The nesting habitat is described as montane forests with steep slopes and rocky substrate, with or without vegetation or humus cover that provides underground pockets and cavities for excavating nests. They may also burrow at the base of native arborescent ferns (Brown and Jean 2021, p. 5). The nesting season begins around January, with high parental investment in the nest and chick rearing. The female lays only one egg each season, with an alternating male and female incubation period of 50 to 53 days, followed by shared parenting of the chick for a minimum of 80 days. Adults that are raising young may travel 500 to 1,500 kilometers (km) (310 to 932 miles (mi)) to obtain food for the young and have been found foraging in the Caribbean Sea (Jodice et al. 2015, pp. 26–27). Chicks fledge between May and July, and head out to sea to feed on their own (Simons et al. 2013, pp. S21–S22). When adult birds leave the nesting areas, they may migrate up to 2,200 km (1,367 mi) from the breeding grounds to primary offshore foraging areas off the mid-Atlantic and southern coasts of the United States (Jodice et al. 2015, p. 23).

The adults travel from nests to marine feeding areas during foraging bouts for the young, which generally occur at night; this makes visual observations difficult. The nests are also in rugged montane areas that are not easily accessed, and burrows are difficult to detect. The species was historically used as a food source for the island inhabitants, as the young chicks are easily captured once a burrow is located. The petrels were also drawn in using manmade fires (Sen Sel) intended to disorient the birds, causing them to fly towards the light of the fire and ultimately crashing into the land nearby where they were captured for food (Wingate 1964, p. 154).

Due to the high elevation and rough terrain of the nesting habitat, the species was rarely observed and thought to be extinct until it was rediscovered by Wingate in 1963, in the Massif de la Selle mountain range in Haiti. The estimated population at that time was around 2,000 pairs, based on potential occupied suitable habitat; however, there is some uncertainty of the accuracy of this estimate due to the methods used to extrapolate and it has been suggested that the population may have been even higher (Wingate 1964, p. 154).

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically

relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be listed as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess the black-capped petrel's viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years); redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket FWS–R4–ES–2018–0043 on *https://www.regulations.gov*.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. We provide an overview of the main threats impacting the black-capped petrel's viability, both in its terrestrial breeding habitat and its marine range. Most threats are the result of anthropogenic activities, and the species' apparently finite availability of suitable breeding areas presents a major limiting factor in its ability to maintain viability. We include not only factors negatively affecting the species or its habitat, but also include conservation efforts that have a positive effect on the species. Additional details regarding the threats can be found in the SSA report (Service 2023, entire).

We reviewed the threats that are affecting the black-capped petrel now, and potentially into the future. Due to the pelagic nature of the species, and its dependency on both terrestrial and marine habitats during different life stages, threats act on the species during breeding/nesting/chick rearing and also at sea when not on the nesting grounds. The primary threats to the species on the breeding grounds (terrestrial life stages and habitat) are habitat loss and degradation due to deforestation, anthropogenic forest fires, and development (Factor A) and depredation by introduced mammals (Factor C); additional factors affecting the species for both terrestrial and marine life stages and/or its habitat include collisions with communication towers (Factor E) and artificial lighting that causes disorientation (grounding and collisions) (Factor E). At sea, the species uses areas that may overlap with coastal and offshore wind infrastructure and development (Factor E), and offshore oil and gas development (Factor E). In addition, marine fisheries bycatch may occur when black-capped petrels are incidentally caught in fishing gear and the artificial lighting on fishing vessels may cause disorientation (Factor E). The effects of climate change are also expected to affect the species through increased storm intensity and frequency, resulting in flooding of burrows and erosion of suitable nesting habitat (Factors A E). The predicted increase in strong Atlantic storms or hurricane frequency due to climate change is also expected to lead to an increase in land strandings (Factor E). We discuss each of these factors in more detail below, however, additional information on the threats can be found in the SSA report (Service 2023, pp. 15–37).

Deforestation

Deforestation, and associated loss and degradation of nesting habitat, is considered one of the most significant threats to the black-capped petrel (Goetz et al. 2012, entire; Wheeler et al. 2021, pp. 12–16). Many of the Caribbean islands where petrels were historically reported have experienced extremely high rates of forest conversion and loss since European colonization (Goetz et al. 2012, entire; Simons et al. 2013, p. S31). Urbanization, agricultural development, charcoal production, and tree fern harvesting are driving the changes in the forested areas where the petrels breed.

On Hispaniola, where all known currently active black-capped petrel nesting sites occur, estimates of deforestation range from nearly 90 percent of primary forests removed in the Dominican Republic portion to more than 90 percent removed in the Haitian portion (Castro et al. 2005, p. 7; Simons et al. 2013, p. S31; Churches et al. 2014, entire). Recent quantitative assessments also indicate that the rate of deforestation in and around petrel nesting colonies and areas of suitable nesting habitat has accelerated in recent years, ranging from 3.8 percent to 56 percent from 2000 to 2018 in areas known or likely to contain petrel nests (Lloyd and Leon 2019, p. 5; Satgé et al. 2021, p. 583).

Deforestation in the Haitian nesting areas is particularly significant for the black-capped petrel given that 50 percent of all active nest sites of the species may occur there (Goetz et al. 2012, p. 5; Wheeler et al. 2021, p. 10). Although deforestation in petrel nesting areas of the Dominican Republic has been comparatively lower, recent increases in forest clearing for subsistence agriculture and charcoal production in the Sierra de Bahoruco and other areas adjacent to the Haitian border have resulted in concomitant increases in nesting habitat loss and degradation there (Checo 2009, entire; Grupo Jaragua 2011, entire; Goetz et al. 2012, p. 7; Simons et al. 2013, p. S31).

Charcoal, along with firewood, is used for cooking and is one of the primary sources of energy in Haiti. The overwhelming dependence on wood-

based cooking fuels in parts of Hispaniola has resulted in substantial deforestation and forest conversion in both Haiti and adjacent regions of the Dominican Republic.

Recently, the harvesting of tree ferns to sell as substrate for ornamental plants has been increasingly occurring in black-capped petrel nesting areas of Haiti. The harvesting of these ferns disrupts and destabilizes soil in the vicinity of the nest burrow. At least 14 active nests were destroyed due to this activity during the 2020–2021 nesting season (Brown and Jean 2021, p. 4).

Anthropogenic Fires

The frequency and intensity of fires in and around petrel nesting areas has increased in recent years, further exacerbating, and contributing to deforestation and habitat degradation in the region (Batlle and Ramon 2021, p. 36; IBPCG 2021, p. 1). Effects to the terrestrial habitat from fire may be significant and potentially long-term, as fires set to clear land for agricultural development can result in substantial loss and conversion of forested nesting habitat. Moreover, fires during the incubation and brooding phase can cause injury or mortality for adults and nestlings within nest burrows.

The frequency and intensity of fires in and around black-capped petrel nesting areas has increased in recent years, further exacerbating and contributing to deforestation and habitat degradation in the region (Batlle and Ramon 2021, p. 36; International Black-capped Petrel Conservation Group (IBPCG) 2021, p. 1). Natural fires resulting from lightning strikes also occur, but these tend to occur mainly during the wetter summer months (Robbins et al. 2008, entire). Naturally occurring fires may help maintain open, pine savannahs at higher elevations, which may be more accessible to petrels (Simons et al. 2013, p. S31). In contrast, most anthropogenic fires occur during the winter dry season, when black-capped petrels are actively nesting (Simons et al. 2013, p. S31) and thereby constitute more of a direct threat. Dry season fires also tend to be more intense, delaying or inhibiting forest recovery due to destruction of seed banks and organic humus layers (Rupp and Garrido 2013, entire).

Fires indirectly affect black-capped petrel nesting habitat by increasing erosion and mudslides following elimination of previously existing vegetation and ground cover. In the Massif de la Selle in Haiti, deliberately set fires likely caused increased erosion of cliffs used for nesting by black-capped petrels; the fires were set to facilitate clearing of land and for fuel wood harvesting (Woods et al. 1992, pp. 196–205; Simons et al. 2013, p. S33). For years, such fires have also denuded large swaths of forest cover in the black-capped petrel nesting areas of Pic Macaya in the Massif de la Selle of Haiti (Sergile et al. 1992, pp. 5–12). In the black-capped petrel nesting areas of the Dominican Republic, fires are also at times deliberately set in retaliation for actions taken by government officials to evict or otherwise deter Haitian migrants engaged in illegal land-clearing activities (Rupp and Garrido 2013, entire).

Development

As a Caribbean Island, Hispaniola has desirable coastal property with high potential for recreational and tourist development. Although the high-elevation areas where the black-capped petrel nests are currently among the most remote and sparsely populated areas of Hispaniola, the government of the Dominican Republic has initiated long-term plans to promote major tourism development in the region (Ministerio de Turismo 2012, entire; Dirección General de Alianzas Público Privadas (DGAPP) 2021, entire). These plans are focused immediately south of the petrel nesting areas in the Sierra del Bahoruco, on the coastal area of Pedernales/Cabo Rojo, and include several major resort hotels, apartment complexes, golf courses, a major international airport, and a large marina (DGAPP 2021, entire). The airport is expected to become the second largest in the Dominican Republic in terms of passenger traffic, with an estimated 1.6 million passengers per year at project completion (DGAPP 2021, pp. 89–107). According to official statements and published plans by the Dominican government, this development will consist of a major international airport, large marina or cruise ship terminal, luxury apartment buildings, and several major resort hotels. The area under development is not directly affecting the nesting habitat, as it is not in the highest elevation areas, but it is located along petrel flight paths between the nesting areas in the Sierra del Bahoruco and foraging in the Caribbean Sea, which could affect petrels heading out to sea for foraging bouts. These foraging bouts are important for sustaining brooding adults incubating the nests and returning food to the chicks on the nests. While likely needed for the economic welfare of the local citizens, the infrastructure associated with such developments also inevitably results in a substantial increase in artificial lighting, including that of commercial and private aircraft during nighttime arrivals and departures. Indeed, concerns have recently been raised by local residents over the potential for environmental damage and degradation resulting from this development project (DRS 2022, unpaginated). Concomitant with this development will be an increase in human presence and electric power needs. Wind turbines, as well as a new 138-kilovolt electrical transmission grid parallel to the coast, will be installed to supply power to the region (DGAPP 2021, pp. 57–64). In Hawaii, powerline collisions are a main threat that have contributed to the decline of the Newell's shearwater and Hawaiian petrel (L. Nagatani 2022, pers. comm.). The significant increase in local human population, and associated increases in artificial lighting, will be located between petrel nesting areas in the Sierra del Bahoruco and Caribbean Sea, which also align with petrel flight paths to and from such areas. This could result in direct or indirect mortality of black-capped petrels.

The recent discovery of economically significant sources of Rare Earth Elements (REE) in the southern Sierra del Bahoruco prompted the Dominican government to set aside a large tract of land near current petrel nesting areas for the exploration and extraction of these resources, which are critical components in solar and cellular communication technologies.

Depredation by Introduced Mammals

Like most native Caribbean species, the black-capped petrel evolved in the absence of mammalian ground predators. However, following European colonization, many Caribbean islands quickly became host to populations of introduced black rats (*Rattus rattus*), Norway rats (*Rattus norvegicus*), domestic dogs (*Canis familiaris*), feral pigs (*Sus scrofa*), and domestic cats (*Felis domesticus*). In the late 1800s, the deliberate introduction of the small Indian mongoose (*Herpestes javanicus*) resulted in apparently uncontrollable mongoose populations on all islands (except Dominica) where the black-capped petrel is known or suspected to nest or once nested (Barun et al. 2011, pp. 19–20; Simons et al. 2013, p. S31).

The primary cause of nest failure is predation by nonnative species (Wheeler et al. 2021, p. 16). Recent surveys at nesting areas have also found higher rates of predation than previously known. For instance, the Loma del Toro nesting area is in the Sierra de Bahoruco of the Dominican Republic and is approximately 370 ac (150 hectares (ha)) (Wheeler et al. 2021, p. A2–77). Since 2018, cumulative monitoring of 95 black-capped petrel

nesting attempts suggests that overall success rates (53 percent) are lower than the nearby Morne Vincent nesting area in Haiti (IBPCG 2018, entire; IBPCG 2019, entire; IBPCG 2020, entire; IBPCG 2021, entire). During the recent black-capped petrel nesting season (2021–2022), nest success estimated from the 23 nests monitored in this colony declined to 22 percent (5 successful nests and 18 unsuccessful) (E. Rupp, Grupo Jaragua, in litt.), and severe nest predation by stray dogs has occurred in this nesting area (IBPCG 2021, p. 1). Historical (*i.e.,* prior to the introduction of exotic mammals into black-capped petrel habitat) estimates of nest success in this area are unavailable.

Valle Nuevo National Park, Dominican Republic, was a suspected nesting area prior to 2017, when nesting was confirmed. To date, 13 black-capped petrel nests have been identified within an area of approximately 35 ac (14 ha) (Wheeler et al. 2021, p. A2–81; IBPCG 2021, p. 4). As with all other black-capped petrel nesting colonies, black-capped petrels nesting in Valle Nuevo face the threats of agricultural activities, habitat loss, and communication towers (Goetz et al. 2012, p. 5; Wheeler et al. 2021, pp. 12–16), all of which exacerbate predation by invasive mammals. This is in addition to the increasing threat posed by encroachment of invasive ferns, which block access to nest sites (Wheeler et al. 2021, p. 14; Davis 2019, p. 58). All nests at Valle Nuevo failed to fledge young during both the 2020 (n=13) and 2021 (n=17) nesting seasons, and predation by the invasive mongoose is believed to be the cause (IBPCG 2021, p. 4; E. Rupp, Grupo Jaragua, in litt.).

New information shows the threat of depredation is affecting the reproductive success of the species and is more widespread than previously described. The documented loss of black-capped petrels to mammal depredation at three of the four nesting sites has a significant negative impact to the overall reproduction of the species. Each breeding pair lays one egg per nesting season. In 2021, it was documented that one single dog predated at least 19 black-capped petrels. During the 2020 to 2021 period, at Pic La Visite, 54 percent of the nests were lost to mammal depredation, with adult black-capped petrels also lost to mammal depredation. Similar declines in nest success were documented at Loma del Toro, where 85 percent of the nests were lost to mammal depredation, and at the Valle Nuevo area, where all nests were lost to mammal depredation (in addition to the loss of adults) during the 2019–2020 and 2020–2021 periods.

Communication Towers and Artificial Lighting

Recent years have seen the proliferation of telecommunication towers throughout the Caribbean islands. These towers are typically located on high mountain ridges, hills, and other prominent topographic features, and the structures extend several meters above canopy level. Many of the tallest are also secured by numerous guy wires (Longcore et al. 2008, entire; Simons et al. 2013, p. S32). Petrels, particularly inexperienced fledglings and juveniles, are especially sensitive to artificial lighting, likely due to a dependence on visual cues such as moonlight and starlight for nocturnal navigation (see Imber 1975, p. 304; Le Corre et al. 2002, p. 390; Rodriguez and Rodriguez 2009, p. 303; Rodriguez et al. 2017a, p. 989; Rodriguez et al. 2017b, p. 68). Petrels that nest in burrows or cavities are more affected by artificial lighting than ground-nesting species due to their inherent nature to associate light with food (Imber 1975, p. 305). Because of the black-capped petrel's nocturnal activity, combined with the high speed at which they fly, they are highly vulnerable to aerial collisions with these unseen structures, especially on foggy nights typical of the petrel nesting season (Goetz et al. 2012, p. 8; Longcore et al. 2013, entire; Simons et al. 2013, p. S32). There have been numerous documented cases of black-capped petrel mortality and injury from aerial collisions with lighted structures in or near their breeding areas (Goetz et al. 2012, p. 8; Simons et al. 2013, p. S32), as well as groundings of adults and fledglings (Rodriguez et al. 2017a, p. 989).

Wind Energy

Infrastructure associated with offshore, coastal, and upland wind energy projects can cause collision risks for black-capped petrels at sea or on their breeding areas on Hispaniola. The increasing use of wind farms on and near Caribbean islands may constitute a potential threat to flying petrels (Simons et al. 2013, p. S32). As with communication towers, land-based wind farms tend to be located on high ground, where winds are higher and more constant. Threats are not only associated with collisions with fan blades, but also disorientation from associated lights with which such structures are equipped. Recent construction of inland wind farms near black-capped petrel nesting areas on Hispaniola constitute an additional and unquantified threat.

For offshore wind energy sites, not only are there risks associated with collisions and lighting impacts, but wind farms can change the local hydrodynamics and species distribution. For example, turbidity is affected and influences predator and prey interactions, where predators may be attracted to and prey may avoid the area affected (Van Berkel et al. 2020, pp. 113–114).

In the United States, as of 2022, the only offshore areas that have operating wind farms are off the coasts of New Jersey and Virginia. While existing offshore wind energy areas are outside of the black-capped petrel's range, some future potential wind energy areas off the Atlantic coast of the United States do overlap with small portions of the species' core areas (primary foraging area) and home ranges (Satgé et al. 2022, p. 14). On August 1, 2023, the Bureau of Ocean Energy Management (BOEM) identified wind energy areas off the coast of Delaware, Maryland, and Virginia in a Notice of Intent to Prepare an Environmental Assessment (88 FR 50170); however, these areas are closer inland than black-capped petrels normally forage and would likely only affect individual petrels that are blown off their normal areas in high wind situations.

In the northern Gulf of Mexico, there have been studies to determine offshore wind potential. The BOEM proposed wind energy lease areas in October 2022 off the coast of Louisiana and Texas (BOEM 2022, entire). However, these areas are 40–50 mi (64.4–80.1 km) from documented black-capped petrel locations (Jodice et al. 2021, entire). There are also plans to develop wind energy areas off the coast of Colombia, South America that may affect the black-capped petrel.

Wind energy impacts on the black-capped petrel are not well-studied; however, we are aware that take of other petrel species has occurred due to wind farm activities. For example, the Service has issued incidental take permits to several wind farms in the State of Hawaii. The effect of nesting petrel mortality caused by wind turbines (or any other factors) could be effectively doubled as the single chick would likely die within the nest burrow from subsequent starvation due to the lack of biparental care (Hamer et al. 2002, pp. 238–243).

Offshore Oil and Gas

Activities associated with offshore oil and gas infrastructure and operations could pose a threat to black-capped petrels or their habitat. Some of the hazards include collisions,

disorientation from lighting/flaring, and exposure to petroleum products and other discharged wastewater products.

Offshore oil and gas operations are ongoing in many areas of the species' marine range. In the U.S. waters, there is ongoing and planned oil and gas activity in the northern Gulf of Mexico that overlaps with the black-capped petrel's range (Jodice et al. 2021, p. 60). There is also oil and gas production off the coasts of Cuba, Colombia, and Venezuela. Black-capped petrels were observed foraging in the southern Caribbean Sea in Colombian lease areas under evaluation or exploration, or open for concession; minimum distances to an active lease area and a well in production were 7 km (4.3 mi) and 24 km (15 mi), respectively (Satgé et al. 2019, pp. 40–41). In addition, petrels occurred 34 km (21.1 mi) from an active lease area, and 50 km (31 mi) from a well in production, near Venezuela (Satgé et al. 2019, p. 12). Black-capped petrels utilizing these areas for foraging or resting could be exposed to hydrocarbon releases during accidental oil spills, as well as to increased concentrations of contaminants from uncontrolled seepage. This could result in direct mortality (*i.e.,* external oiling); indirect mortality (ingestion of crude oil through prey or preening); or sublethal effects on reproduction, such as hormone suppression, impaired egg formation, or increases in malformations (Helm et al. 2015, pp. 431–453).

Marine Fisheries

The range of the black-capped petrel overlaps with international industrial fishing fleets and squid fisheries, with squid fishing occurring in the Caribbean Sea. The vessels targeting squid use very bright lights to attract their catch, which could cause disorientation of, and increase the number of collisions with, black-capped petrels; however, there is little information from foreign fishing fleets regarding the impacts from fisheries (Simons et al. 2013, p. S33). There has been at least one incident of black-capped petrel collision with a fisheries research vessel in the northern Gulf of Mexico in U.S. waters (Satgé et al 2023, p. 57). The collision occurred at night and the vessel was lighted, which likely contributed to attraction and disorientation of the petrel.

Aside from lighting, petrels can become entangled in fishing lines, nets, and hooks during their foraging bouts. There are several methods of commercial fishing practiced in the species' range, including pelagic long line fishing, gillnet use, and trawling. Marine fisheries may entangle seabirds in clear monofilament fishing lines or hooks and increase opportunity for collisions with vessels (Furness 2003, p. 34; Li et al. 2012, p. 563). It is difficult to conclusively determine the direct and indirect impacts to black-capped petrels from marine fisheries based on the available information. It was estimated that between 8 to 24 black-capped petrels were affected by pelagic longline fishing in the U.S. Atlantic waters between 1992 to 2016; this analysis was based on the relationships between seabird bycatch likelihood and the surface-scavenging behavior of species, such as petrels, resulting in a higher chance of interaction with longline fishery gear (Zhou et al. 2019, p. 1332).

Climate Change

The black-capped petrel faces potential impacts from climate change effects on both foraging and breeding areas through differing mechanisms (Simons et al. 2013, p. S33). Regarding the marine range where the species is found (when not in breeding status), there is a strong association with the Gulf Stream current and upwellings off the southeastern U.S. coast that influences the species' vulnerability to climate-induced changes. Increases in temperature affect the intensity and track of the Gulf Stream current and associated changes in marine primary productivity, as well as the abundance and diversity of marine nekton (*i.e.,* actively swimming aquatic organisms), which are essential food sources for the black-capped petrel (Chávez et al. 2011, p. 230; Bakun et al. 2015, pp. 85–86; Saba et al. 2016, p. 131; Siqueira and Kirtman 2016, pp. 3965–3966; Kimball et al. 2020, p. 936; Zhang et al. 2020, pp. 707–710). For example, in coastal South Carolina, over a 30-year period, the subtidal nekton assemblage transitioned to a state of lower abundance and different composition as a result of increased water temperature and storm events (Kimball et al. 2020, pp. 927–928).

The terrestrial habitat is also impacted by the effects of climate change due to changes in storm and hurricane regimes. Increased intensity and frequency of major (Category 3 to Category 5) Atlantic hurricanes (Bender et al. 2010, p. 456), combined with reduced translation speeds (*i.e.,* the speeds at which hurricanes move), may further accelerate erosion and degradation of nesting areas (Hass et al. 2012, p. 259; Simons et al. 2013, p. S33; Kossin 2018, p. 104).

Because of the species' highly specific nesting habitat requirements, found only in areas highly sensitive to climatic change, those areas are among the most vulnerable to the adverse effects of climate change (Williams et al. 2007, pp. 5739–5740; Sekercioglu et al. 2008, p. 145; Thurman et al. 2020, p. 520). The species is restricted to the highest elevations on Hispaniola, and should such areas be rendered unsuitable, the species would have no place to go to seek climate refugia, thus increasing the extinction risk.

Conservation Efforts and Existing Regulatory Mechanisms

The black-capped petrel is protected under the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703–712). Protections from this Act are limited to areas within the United States or its Territories and Commonwealths, and the black-capped petrel does occur within waters of the United States. Permits are required for activities within U.S. jurisdiction that may cause the taking, possession, transportation, sale, purchase, barter, importation, exportation, and banding or marking of migratory birds. There are also certain exceptions to permit requirements for public, scientific, or educational institutions, and there are depredation orders that provide limited exceptions to the provisions of the Migratory Bird Treaty Act. See title 50 of the Code of Federal Regulations (CFR) at part 21 for more information about these permit requirements and exceptions.

Ongoing conservation efforts by many organizations include research and public outreach for the conservation of the black-capped petrel. Several nongovernmental organizations (NGOs) are currently working in Haiti and the Dominican Republic to reduce or mitigate the severity of identified threats. These NGOs include international organizations (*e.g.,* BirdsCaribbean, Environmental Protection in the Caribbean, Plant with Purpose, American Bird Conservancy, International Black-capped Petrel Conservation Group (IBPCG)), as well as local organizations (*e.g.,* Grupo Jaragua, Société Audubon Haiti). Because most of the threats to the black-capped petrel are directly the result of anthropogenic activities (Service 2023, pp. 15–35), these NGOs have been providing technical assistance and education on sustainable agricultural practices, watershed management, and reforestation of previously deforested and degraded areas in the regions where black-capped petrels nest.

Conservation efforts, including environmental education regarding the black-capped petrel, occur at the local level. For example, in Boukan Chat, Haiti (adjacent to the Morne Vincent petrel nesting area), NGOs have developed black-capped petrel

educational programs for local schoolchildren, provided financial and technical assistance with construction of freshwater cisterns, and provided tree seeds and technical assistance for local reforestation projects. Some residents of Boukan Chat have been hired specifically to improve community awareness of the black-capped petrel and its plight, and of how sustainable land management can be mutually beneficial to both the community and the petrel.

Building on past and current efforts, the IBPCG recently compiled and published a comprehensive and strategic conservation action plan (hereafter, ''Plan'') for the long-term conservation of the black-capped petrel (Wheeler et al. 2021, entire). The Plan summarizes recent information relative to species conservation, including nesting habitat modeling and population viability analyses; additionally, the Plan identifies priorities such as promoting petrel conservation through local community involvement, as well as habitat and species conservation measures. The Plan is a guide for current and future black-capped petrel conservation efforts.

Other NGO efforts include recent production of the documentary ''Save the Devil,'' detailing local efforts to save the species, in addition to active monitoring for forest fires near black-capped petrel nesting areas, continued monitoring of petrel nest success in the Morne Vincent/Sierra del Bahoruco nesting area, continued radar and bio-acoustical monitoring for petrel detections, and working with owners of a local communication tower to reduce nocturnal lighting intensity (Brown 2016, entire; IBPCG 2016, entire; 2017, entire; Wheeler et al. 2021, entire). Additionally, there have been some efforts to trap introduced predators at or near black-capped petrel nest sites, but results have been hindered by the remoteness of field sites and theft of traps. While some efforts are locally successful, they are relatively limited in both geographic scope and funding. There are other areas of Hispaniola which harbor, or may harbor, black-capped petrel nesting colonies (*e.g.,* Pic Macaya, Pic La Visite, Massif de La Selle) that could benefit from similar efforts.

Cumulative and Synergistic Effects

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future conditions of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

Current Condition

Below, we provide an overall summary of the species' current condition in terms of resiliency, redundancy, and representation as described in detail in the SSA report (Service 2023, pp. 37–61) and include new information that indicates the current condition is lower than described in the October 9, 2018, proposed rule (83 FR 50560).

The black-capped petrel's current condition is based on the breeding grounds and the life stages associated with the terrestrial habitat. The nesting areas include three in Haiti (Pic Macaya, Pic la Visite, and Morne Vincent) and three in Dominican Republic (Sierra de Bahoruco/Loma del Toro, Valle Nuevo, and Loma Quemada), with Pic Macaya recently considered extirpated. As noted above, Morne Vincent and Loma del Toro are ecologically the same nesting area but are on different sides of the border between Haiti and Dominican Republic. We identified them separately for purposes of our analysis because of differences in threats. The resiliency of the populations at each breeding area was analyzed using available data associated with demographic factors, including acoustic and radar detections, number of active nests, and new success for each of the populations (Service 2023, pp. 53–55). Each of the demographic factors were compiled for each population and qualified using low, medium, and high descriptions (Service 2023, pp. 53–55). We did not apply habitat factors or threats during the resiliency analyses but considered those factors along with redundancy and representation in the overall current condition and species' viability (Service 2023, pp. 59–61). Principal factors that have adversely affected current conditions include increases in (1) forest fires, (2) predation of nests and adults by nonnative mammals, (3) loss and degradation of nesting habitat, and (4) direct effects of hurricanes and tropical storms.

The species exhibits low resiliency at Loma Quemada and Valle Nuevo, medium resiliency at Morne Vincent and Sierra de Bahoruco/Loma del Toro, and high resiliency at Pic la Visite; it is considered extirpated at Pic Macaya. The current condition of each breeding site reflects the current resiliency based on historical optimal conditions (Service 2023, pp. 52–55).

Resiliency of the populations in the nesting areas are lower than previously described in our 2018 proposed rule, influenced greatly by depredation by nonnative mammals. For example, the Valle Nuevo nesting population in the Dominican Republic has experienced an apparent complete failure of all known nests over two recent (2020, 2021) nesting seasons (IBPCG 2021, p. 1; IBPCG 2022, p. 6), largely because of mongoose predation. The nesting colony at Pic Macaya in Haiti once accounted for 5 percent of the total breeding population; however, the habitat conditions have deteriorated, and no nesting has been detected here in the past 20 years. This site is in the far southwestern point of Haiti where, despite its location within Macaya National Park, the habitat has been heavily impacted by agricultural development and fires (Goetz et al. 2012, p. 5; Wheeler et al. 2021, p. A2–84), with up to 56 percent of total forest cover lost in the period 2000–2018 (Satgé et al. 2021, p. 586). Additional ongoing impacts to the species and its nesting habitat in this area include depredation by introduced mammals (cats, rats, and feral pigs). This site is considered extirpated.

Such threats on the nesting grounds are currently reducing the species' reproductive success in affected breeding populations through direct losses of adult breeding birds. The black-capped petrel is a *k*-selected species, meaning a species whose populations fluctuate at or near the carrying capacity (*k*) of the environment in which they reside. *K*-selected species tend to produce relatively low numbers of offspring and are characterized by more parental investment in nesting and chick-rearing and longer lifespans. For strongly *k*-selected species such as the black-capped petrel, losses of breeding adults exacerbate the ecological effects of lowered reproductive output because of the level of parental care they provide to offspring, and population modeling for similar species has shown that such combined effects—if not controlled—can quickly place the species at risk of extinction (Simons 1984, p. 1071). Even

a rather ''generic'' population viability analysis (PVA) based on composite data from 35 other *Pterodroma* species predicts a steady decline in population viability for the black-capped petrel during this century, with a nearly 75 percent decrease in total population over the next 50 years (Wheeler et al. 2021, p. 18).

While resiliency at Pic la Visite was considered high, nearly 50 percent of all known active nests are also concentrated in a single area at Pic la Visite within 2.47 ac (1 ha) (Wheeler et al. 2021, pp. 10, A2–73). Recent species-specific habitat modelling (Satgé et al. 2021, entire), demonstrates that the amount and distribution of suitable nesting habitat for the species on Hispaniola is approximately 70 percent less than previously believed (*i.e.,* Service 2019, p. 48), and that such habitats have been severely reduced and fragmented by ongoing forest loss for the past two decades. This limited availability and distribution of suitable high-elevation nesting habitats renders such areas highly vulnerable to slight changes in environmental conditions due to climate change. Recent (2018–2021) trends and data suggest that many of the major threats acting on the species are increasing in both magnitude and biological impact.

Threats related to anthropogenic stress and climate change have caused reduced resiliency of breeding populations, which, in turn, cause low species-level redundancy. This hinders the ability of the species to withstand climate change-induced catastrophic events (*e.g.,* hurricanes), and inflexible breeding habitat requirements would make it difficult for black-capped petrels to move to other geographic areas, should their current terrestrial habitat become unsuitable.

Redundancy reflects the capacity of a species to persist in the face of catastrophic events. This is best achieved by having multiple, widely distributed resilient populations across the geographical range of the species. As described, most known nests (80 to 90 percent) are believed to be within the Pic La Visite and Morne Vincent/Loma del Toro nesting areas (Brown and Jean 2021, p. 2). This means that most nests are within a geographically restricted area, which would hinder the species' ability to face catastrophic events. Additionally, this geographically restricted area is currently subject to significant and increasing pressure from deforestation and other anthropogenic activities (IBPCG 2019, pp. 2–3; Wheeler et al. 2021, p. A2–74). With the recent extirpation of the westernmost population in Haiti (Pic Macaya) due to habitat loss and degradation, the redundancy on Hispaniola is lower than described in the October 9, 2018, proposed rule (83 FR 50560).

Representation reflects the adaptive capacity of a species in the face of current and future physical (*e.g.,* climatic variations, habitat degradation, and anthropogenic structures) and biological (*e.g.,* novel predators, pathogens) changes in environmental conditions. The species has been confined to a single island for nesting, with the loss of populations on Martinique, Guadeloupe, and Dominica. Because the black-capped petrel has high nesting site fidelity, the loss of these breeding populations on other islands likely has resulted in the loss of unique genotypes and phenotypes, contributing to an overall limited representation. The species' current condition is even lower than described in the October 9, 2018, proposed rule (83 FR 50560) due to lower resiliency across most breeding areas and limited redundancy and representation. Due to the immediate threats—habitat loss and degradation, and depredation—affecting the species and its nesting habitat, the species' overall viability has declined.

Future Condition

In describing the species' viability in the future, we considered the predictive range of existing data and projected threats and the species' response using three plausible scenarios. We assessed the threat of habitat destruction, modification, or curtailment on the nesting grounds in terms of land clearing for charcoal production on Hispaniola as a result of increased human populations and limited insular resource availability. As the human population increases, the demand for charcoal will increase, resulting in more cleared lands and a greater impact on the primary forests. We also considered the effects of climate change into the future and describe changes in the hurricane regime and temperatures that will affect the black-capped petrel on its nesting grounds and potentially in its marine range. As we have determined that the species meets the Act's definition of an ''endangered species'' (see Determination of Black-capped Petrel's Status, below), the future conditions are not described in detail in this final rule. Instead, details regarding the future conditions analysis and the future resiliency, redundancy, and representation of the black-capped petrel are presented in detail in the SSA report (Service 2023, pp. 62–79), which is available at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0043.

Determination of Black-Capped Petrel's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of endangered species or threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we have determined habitat loss and degradation due to deforestation from fires for agricultural development and charcoal production are currently affecting the species and its nesting grounds on the island of Hispaniola (Factor A). Fires are used to remove forest cover to allow for agricultural crops. Historically, the black-capped petrel also nested on the islands of Guadeloupe, Martinique, Dominica, and possibly Cuba but is now confined to a single island. The species was extirpated from Martinique in pre-Columbian times by island residents that overharvested the petrel for consumption (Factor B). Further, depredation by nonnative mammalian species is a threat to petrels on islands, contributed to the loss and extirpation of the species on the island of Dominica in the late 19th century, and is currently affecting the black-capped petrel (Factor C). Additionally, the species' nesting range is limited to steep, high-elevation areas that can be affected by erosion due to increased hurricane intensity and frequency, reducing available cavities or access to nesting sites (Factor E).

The current resiliency for the black-capped petrel is described as low and is expected to decline in the near future, along with having limited redundancy and representation. The overall species'

viability reflects the nature of an island endemic that has a breeding area confined to the highest elevation of a single island. In 1961, the population was estimated to be around 8,000, and it is suggested that it has declined in abundance by 50 to 75 percent over the last 50 years. With an estimated breeding population of 500 to 1,000 breeding pairs (Simons et al. 2013, p. S22; BirdLife International 2022, unpaginated), impacts at any breeding site in any given breeding season have consequences to the species' overall viability. For a species where a breeding pair produces a single egg each year, those consequences include loss of reproductive potential for the affected adults and chicks of that generation.

Due to increasing habitat loss and degradation through deforestation for agricultural development and charcoal production, the recent habitat suitability modeling for the species (Satgé et al. 2021, entire) found that the suitable breeding habitat is 70 percent less than what we previously estimated in 2018 (Satgé et al. 2021, pp. 583–586).

New information shows the threat of depredation is affecting the reproductive success of the species and is more widespread than previously described. The documented loss of black-capped petrels to mammal depredation at three of the four nesting sites has a significant negative impact to the overall reproduction of the species. Each breeding pair lays one egg per nesting season. In 2021, it was documented that one single dog predated at least 19 black-capped petrels. During the 2020 to 2021 period, at Pic La Visite, 54 percent of the nests were lost to mammal depredation, with adult black-capped petrels also lost to mammal depredation. Similar declines in nest success were documented at Loma del Toro, where 85 percent of the nests were lost to mammal depredation, and at the Valle Nuevo area, where all nests were lost to mammal depredation (in addition to the loss of adults) during the 2019–2020 and 2020–2021 periods.

In addition to depredation, there are other threats to the breeding areas, including development, fires, collisions with communication towers, and artificial lighting, The effects of climate change are also expected to affect the species through increased storm intensity and frequency, resulting in flooding of burrows and erosion of suitable nesting habitat. The degree of impacts from these threats varies from site to site. These threats to the nesting areas are reducing the species' reproductive success and are causing direct losses of breeding animals.

Due to the loss of nesting areas across the historical range of the species, the black-capped petrel is currently only confirmed to be reproducing on the island of Hispaniola. The species' range reduction has led to the loss of redundancy of populations, with only four known nesting colonies remaining, all confined to one island, and 50 percent of the nesting populations within a very small geographical area, making the species highly susceptible to catastrophic events. This also contributes to the loss of representation; as the species has high fidelity to the same nesting sites each year, there is limited genetic exchange between populations. With the loss of populations on other islands, this reduces the potential for additional genetic lineages to increase genotypic diversity within the species. There is a documented decrease in breeding habitat availability and habitat quality, coupled with a declining breeding population.

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we find that rapidly declining habitat availability and quality, combined with a substantial increase in both the extent and intensity of mammal depredation to nests and adult nesting black-capped petrels between 2019 to 2021, show that the species is in danger of extinction now. Moreover, due to the imminent nature of these threats acting on the species and its habitat along with the species' response to the threats, the species is currently in danger of extinction. Thus, after assessing the best available information, we determine that the black-capped petrel is in danger of extinction throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range. We have determined that the black-capped petrel is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portions of its range. Because the black-capped petrel warrants listing as an endangered species throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020), which vacated the provision of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014) providing that if the Service determines that a species is threatened throughout all of its range, the Service will not analyze whether the species is endangered in a significant portion of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the black-capped petrel meets the Act's definition of an endangered species. Therefore, we are listing the black-capped petrel as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. The listing of a species results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, NGOs, and stakeholders) may be established to develop and implement recovery plans. The recovery

planning process involves the identification of actions that are necessary to halt and reverse the species' decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (*https://www.fws.gov/program/endangered-species*), or from our Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, NGOs, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Once this species is listed (see **DATES**, above), funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and NGOs. In addition, pursuant to section 6 of the Act, the States of Georgia, North Carolina, South Carolina, and Virginia will be eligible for Federal funds to implement management actions that promote the protection or recovery of the black-capped petrel. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance.*

Please let us know if you are interested in participating in recovery efforts for the black-capped petrel. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a)(2) states that each Federal action agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Each Federal agency shall review its action at the earliest possible time to determine whether it may affect listed species or critical habitat. If a determination is made that the action may affect listed species or critical habitat, formal consultation is required (50 CFR 402.14(a)), unless the Service concurs in writing that the action is not likely to adversely affect listed species or critical habitat. At the end of a formal consultation, the Service issues a biological opinion, containing its determination of whether the Federal action is likely to result in jeopardy or adverse modification.

Examples of discretionary actions for the black-capped petrel that may be subject to consultation procedures under section 7 include management and any other habitat-altering activities on Federal waters administered by the Department of Defense or NOAA; and offshore energy activities of the BOEM and Bureau of Safety and Environmental Enforcement (BSEE).

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any species listed as an endangered species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is the policy of the Services, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of a listed species.

At this time, we are unable to identify specific activities that would not be considered to result in a violation of section 9 of the Act beyond what is already clear from the descriptions of prohibitions or already excepted through our regulations at 50 CFR 17.21 (*e.g.,* any person may take endangered wildlife in defense of his own life or the lives of others). Also, as discussed above, certain activities that are prohibited under section 9 may be permitted under section 10 of the Act.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act if they are not authorized in accordance with applicable law; this list is not comprehensive:

(1) Unauthorized handling or collecting of the species;

(2) Discharge of contaminants into or near foraging areas; and

(3) Use of artificial lights on structures or vessels in or near foraging areas.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Critical Habitat

Background

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information

Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Critical Habitat Prudency

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

In our October 9, 2018, proposed rule (83 FR 50560), we found the designation of critical habitat for the black-capped petrel was not prudent, in accordance with 50 CFR 424.12(a)(1), because destruction of habitat is not a threat to the species in the U.S. portions of the range. However, since the publication of the proposed rule, new information provides evidence that there are threats acting on the species within areas under U.S. jurisdiction. Those threats include offshore energy development, including petroleum (oil and gas) and renewable sources (wind). These threats currently affect the species' marine habitat to a limited degree; however, those impacts are expected to increase with future offshore energy development. Accordingly, we have determined that the designation of critical habitat for the black-capped petrel is prudent.

Critical Habitat Determinability

Our regulations at 50 CFR 424.12(a)(2) state that the designation of critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

The data sufficient to perform the required consideration of economic impacts are lacking at this time. Therefore, we conclude that the designation of critical habitat for the black-capped petrel is not determinable at this time. The Act allows the Service an additional year to publish a critical habitat designation that is not determinable at the time of listing (16 U.S.C. 1533(b)(6)(C)(ii)).

Required Determination

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that no Tribal lands fall within the boundaries of the black-capped petrel's range, so no Tribal lands would be affected by the listing of the species.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Caribbean Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11, in paragraph (h), by adding an entry for ''Petrel, black-capped'' to the List of Endangered and Threatened Wildlife in alphabetical order under BIRDS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
BIRDS				
*	*	*	*	*
Petrel, black-capped	*Pterodroma hasitata*	Wherever found	E	88 FR [INSERT **FEDERAL REGISTER** PAGE WHERE DOCUMENT BEGINS], 12/28/2023.
*	*	*	*	*

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–28456 Filed 12–27–23; 8:45 am]

BILLING CODE 4333–15–P

Proposed Rules

Federal Register
Vol. 88, No. 248
Thursday, December 28, 2023

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2401; Project Identifier AD–2023–01278–E]

RIN 2120–AA64

Airworthiness Directives; International Aero Engines, LLC Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2022–19–15, which applies to certain International Aero Engines, LLC (IAE LLC) Model PW1100G series engines; and AD 2023–16–07, which applies to certain IAE LLC Model PW1100G series engines and PW1400G series engines. AD 2022–19–15 requires an angled ultrasonic inspection (AUSI) of the high-pressure turbine (HPT) 1st-stage disk and HPT 2nd-stage disk, and replacement if necessary. AD 2023–16–07 requires an AUSI of the HPT 1st-stage hub (also known as the HPT 1st-stage disk) and HPT 2nd-stage hub (also known as the HPT 2nd-stage disk) for cracks, and replacement if necessary, which is terminating action for AD 2022–19–15. Since the FAA issued those two ADs, an investigation determined an increased risk of powder metal anomalies for all powder metal parts in certain powder metal production campaigns, which are susceptible to failure significantly earlier than previously determined. This proposed AD would retain the AUSI requirement for certain HPT 1st-stage and HPT 2nd-stage hubs from AD 2023–16–07. This proposed AD would also require performing an AUSI of the HPT 1st-stage hub, HPT 2nd-stage hub, high-pressure compressor (HPC) 7th-stage integrally bladed rotor (IBR–7), and HPC 8th-stage integrally bladed rotor (IBR–8) for cracks and replacement if necessary. This proposed AD would also require accelerated replacement of the HPC IBR–7, HPC IBR–8, HPC rear hub, HPT 1st-stage hub, HPT 1st-stage air seal, HPT 1st-stage blade retaining plate, HPT 2nd-stage hub, HPT 2nd-stage blade retaining plate, and HPT 2nd-stage rear seal. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by January 17, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–2401; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For Pratt & Whitney (PW) service information identified in this NPRM, contact International Aero Engines, LLC, 400 Main Street, East Hartford, CT 06118; phone: (860) 565–0140; email: *help24@pw.utc.com;* website: *connect.prattwhitney.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7655; email: *carol.nguyen@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–2401; Project Identifier AD–2023–01278–E'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2022–19–15, Amendment 39–22184 (87 FR 59660, October 3, 2022; corrected October 24, 2022 (87 FR 64156)) (AD 2022–19–15),

for certain IAE LLC Model PW1122G–JM, PW1124G1–JM, PW1124G–JM, PW1127G1–JM, PW1127GA–JM, PW1127G–JM, PW1129G–JM, PW1130G–JM, PW1133GA–JM, and PW1133G–JM engines. AD 2022–19–15 was prompted by an analysis of an event involving an International Aero Engines AG V2533–A5 model turbofan engine, which experienced an uncontained failure of an HPT 1st-stage disk that resulted in high-energy debris penetrating the engine cowling. AD 2022–19–15 requires performing an AUSI of the HPT 1st-stage disk and HPT 2nd-stage disk and, depending on the results of the inspections, replacing the HPT 1st-stage disk or HPT 2nd-stage disk. The agency issued AD 2022–19–15 to prevent failure of the HPT 1st-stage disk and HPT 2nd-stage disk.

Since the FAA issued AD 2022–19–15, an Airbus Model A320neo airplane powered by IAE LLC Model PW1127GA–JM engines experienced a failure of the HPC IBR–7 that resulted in an engine shutdown and an aborted take-off. Following this event, the manufacturer conducted a records review of production and field-returned parts and then re-evaluated their engineering analysis methodology. The new analysis identified HPT 1st-stage hubs and HPT 2nd-stage hubs that are susceptible to failure significantly earlier than previously determined. On August 4, 2023, PW issued service information with procedures for an AUSI to detect cracks and prevent premature failure. The manufacturer's updated analysis also identified PW1400G series engines that contain HPT 1st-stage hubs and HPT 2nd-stage hubs that are also subject to the unsafe condition. The FAA determined that the new service information necessitated action much earlier than the compliance time mandated in AD 2022–19–15 and that the additional engines should also be subject to these actions. As a result, the FAA issued AD 2023–16–07, Amendment 39–22526 (88 FR 56999, August 22, 2023) (AD 2023–16–07) for certain IAE LLC Model PW1122G–JM, PW1124G1–JM, PW1124G–JM, PW1127G–JM, PW1127G1–JM, PW1127GA–JM, PW1129G–JM, PW1130G–JM, PW1133G–JM, PW1133GA–JM, PW1428G–JM, PW1428GA–JM, PW1428GH–JM, PW1431G–JM, PW1431GA–JM, and PW1431GH–JM engines. AD 2023–16–07 requires performing an AUSI of the HPT 1st-stage hub (also known as the HPT 1st-stage disk) and HPT 2nd-stage hub (also known as the HPT 2nd-stage disk) for cracks and, depending on the results of the inspections, replacing the HPT 1st-stage hub or HPT 2nd-stage hub, which was terminating action for the requirements of AD 2022–19–15. The FAA issued AD 2023–16–07 to prevent failure of the HPT 1st-stage hub and HPT 2nd-stage hub.

Actions Since the Previous ADs Were Issued

Since the FAA issued AD 2023–16–07, additional manufacturer analysis found that the failure of the HPC IBR–7 was caused by a powder metal anomaly, similar in nature to the anomalies outlined in AD 2022–19–15. The analysis also concluded that there is an increased risk of failure for additional powder metal parts in certain powder metal production campaigns, specifically the HPC IBR–7 and HPC IBR–8, and that all affected parts are susceptible to failure significantly earlier than previously determined. The condition, if not addressed, could result in uncontained hub failure, release of high-energy debris, damage to the engine, damage to the airplane, and loss of the airplane.

Previous NPRM

To address the unsafe condition, the FAA issued an NPRM (Docket No. FAA–2023–2237; Project Identifier AD–2023–01057–E) to supersede AD 2022–19–15 and AD 2023–16–07, which was published in the **Federal Register** on December 12, 2023 (88 FR 86088). However, since that NPRM was issued, the FAA has received information from PW that an error was inadvertently included in the NPRM compliance times for some of the HPT 1st-stage and 2nd-stage hubs, which would have required removal significantly later than necessary. Because the removal timeframe needed to be shortened, the FAA determined it is necessary to withdraw the NPRM and issue a new NPRM for the unsafe condition with the correct compliance times.

The FAA received comments on the previous NPRM (Docket No. FAA–2023–2237; Project Identifier AD–2023–01057–E), which will be copied to Docket No. FAA–2023–2401 and addressed in the final rule.

Since the requirements in this proposed AD are similar to those proposed in the withdrawn NPRM, and because the comment period on the withdrawn NPRM was 30 days, we have good cause to make the comment period for this proposed AD 20 days.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed the following service information:

- PW Alert Service Bulletin (ASB) PW1000G–C–72–00–0224–00A–930A–D, Issue No: 001, dated November 3, 2023, which specifies procedures for performing an AUSI for cracks on affected HPC IBR–7 and HPC IBR–8;
- PW ASB PW1000G–C–72–00–0225–00A–930A–D Issue No: 001, dated November 3, 2023, which specifies procedures for performing an AUSI for cracks on affected HPT 1st-stage hubs and HPT 2nd-stage hubs;
- PW SI NO. 198F–23, dated November 3, 2023, which specifies the list of affected HPT 1st-stage hubs and HPT 2nd-stage hubs, identified by part number and serial number, installed on certain IAE LLC engines.
- PW Service Bulletin PW1000G–C–72–00–0188–00A–930A–D, Issue No: 002, dated July 8, 2022, which was previously approved for incorporation by reference on November 7, 2022 (87 FR 59660, October 3, 2022; corrected October 24, 2022 (87 FR 64156)). This service information specifies procedures for performing an AUSI for cracks on affected HPT 1st-stage hubs and HPT 2nd-stage hubs;
- PW Special Instruction (SI) NO. 149F–23, dated August 4, 2023, which was previously approved for incorporation by reference on August 28, 2023 (88 FR 56999, August 22, 2023). This service information specifies the list of affected HPT 1st-stage hubs and HPT 2nd-stage hubs, identified by part number and serial number, installed on certain IAE LLC engines; and

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in ADDRESSES.

Proposed AD Requirements in This NPRM

This proposed AD would retain none of the requirements of AD 2022–19–15, however, it would retain certain requirements of AD 2023–16–07. This proposed AD would require performing an AUSI of the HPT 1st-stage hub and HPT 2nd-stage hub and replacing as necessary. This proposed AD would also require performing an AUSI of the HPC IBR–7 and HPC IBR–8 for cracks and replacing as necessary. This proposed AD would also require accelerated replacement of the HPC IBR–7, HPC IBR–8, HPC rear hub, HPT

1st-stage hub, HPT 1st-stage air seal, HPT 1st-stage blade retaining plate, HPT 2nd-stage hub, HPT 2nd-stage blade retaining plate, and HPT 2nd-stage rear seal.

Interim Action

The FAA considers this proposed AD to be an interim action. The unsafe condition is still under investigation by the manufacturer and, depending on the results of that investigation, the FAA may consider further rulemaking action.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 430 engines installed on airplanes of U.S. registry. The FAA estimates that 366 engines would need replacement of the HPT 1st-stage hub; 351 engines would need replacement of the HPT 2nd-stage hub; 408 engines would need replacement of the HPC IBR–7; 368 engines would need replacement of the HPC IBR–8; 283 engines would need replacement of the HPC rear hub; and 206 engines would need replacement of the HPT 1st-stage air seal, HPT 1st-stage blade retaining plate, HPT 2nd-stage blade retaining plate, and HPT 2nd-stage rear seal.

The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost (average pro-rated cost)	Cost per product	Cost on U.S. operators
AUSI of HPT 1st-stage hub, HPT 2nd-stage hub, HPC IBR–7, and HPC IBR–8 for cracks.	80 work-hours × $85 per hour = $6,800	$0	$6,800	$2,924,000
Replace HPT 1st-stage hub	10 work-hours × $85 per hour = $850	56,000	56,850	20,807,100
Replace HPT 2nd-stage hub	10 work-hours × $85 per hour = $850	62,000	62,850	22,060,350
Replace HPC IBR–7	10 work-hours × $85 per hour = $850	82,000	82,850	33,802,800
Replace HPC IBR–8	10 work-hours × $85 per hour = $850	93,000	93,850	34,536,800
Replace HPC rear hub	10 work-hours × $85 per hour = $850	132,000	132,850	37,596,550
Replace HPT 1st-stage air seal, HPT 1st-stage blade retaining plate, HPT 2nd-stage blade retaining plate, and HPT 2nd-stage rear seal.	20 work-hours × $85 per hour = $1,700	35,000	36,700	7,560,200

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive 2022–19–15, Amendment 39–22184 (87 FR 64156, October 24, 2022; corrected October 24, 20 (87 FR 64156)); and Airworthiness Directive 2023–16–07, Amendment 39–22526 (88 FR 56999, August 22, 2023); and

■ b. Adding the following new airworthiness directive:

International Aero Engines, LLC: Docket No. FAA–2023–2401; Project Identifier AD–2023–01278–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 17, 2024.

(b) Affected ADs

(1) This AD replaces AD 2022–19–15, Amendment 39–22184 (87 FR 64156, October 24, 2022; corrected October 24, 20 (87 FR 64156)).

(2) This AD replaces AD 2023–16–07, Amendment 39–22526 (88 FR 56999, August 22, 2023) (AD 2023–16–07).

(c) Applicability

This AD applies to International Aero Engines, LLC (IAE LLC) Model PW1122G–JM, PW1124G1–JM, PW1124G–JM, PW1127G–JM, PW1127G1–JM, PW1127GA–JM, PW1129G–JM, PW1130G–JM, PW1133G–JM, PW1133GA–JM, PW1428G–JM, PW1428GA–JM, PW1428GH–JM, PW1431G–JM, PW1431GA–JM, and PW1431GH–JM engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section; 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by an analysis of an event involving an IAE LLC Model PW1127GA–JM engine, which experienced failure of a high-pressure compressor (HPC) 7th-stage integrally bladed rotor (IBR–7) that resulted in an engine shutdown and aborted takeoff. The FAA is issuing this AD to failure of the high-pressure turbine (HPT) 1st-stage hub, HPT 2nd-stage hub, HPC IBR–7, and HPC 8th-stage integrally bladed rotor (IBR–8). The unsafe condition, if not addressed, could result in uncontained hub failure, release of high-energy debris, damage to the engine, damage to the airplane, and loss of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Retained Inspections From AD 2023–16–07, With No Changes

(1) This paragraph restates the requirements of paragraph (g)(1) of AD 2023–16–07. For Group 1 and Group 2 engines with an installed HPT 1st-stage hub having part number (P/N) 30G7301 and a serial number (S/N) listed in Tables 1, 2, 3, or 4 of PW Special Instruction (SI) NO. 149F–23, dated August 4, 2023 (PW SI NO. 149F–23), within 30 days after August 28, 2023 (the effective date of AD 2023–16–07), perform an AUSI of the HPT 1st-stage hubs for cracks in accordance with the Accomplishment Instructions, paragraph 9.A. or 9.B., as applicable, of Pratt & Whitney (PW) Service Bulletin PW1000G–C–72–00–0188–00A–930A–D, Issue No: 002, dated July 8, 2022 (PW1000G–C–72–00–0188–00A–930A–D, Issue 002).

(2) This paragraph restates the requirements of paragraph (g)(2) of AD 2023–16–07. For Group 1 and Group 2 engines with an installed HPT 2nd-stage hub having P/N 30G6602 and an S/N listed in Tables 1, 2, 3, or 4 of PW SI NO. 149F–23, within 30 days after August 28, 2023 (the effective date of AD 2023–16–07), perform an AUSI of the HPT 2nd-stage hubs for cracks in accordance with the Accomplishment Instructions, paragraph 9.C. or 9.D., as applicable, of PW1000G–C–72–00–0188–00A–930A–D, Issue 002.

(h) New Required Actions

(1) For Group 1 and Group 2 engines with an installed HPC IBR–7 having part number (P/N) 30G2307 or 30G4407 or an installed HPC IBR–8 having P/N, 30G5608, 30G5908 or 30G8908, at the next HPC engine shop visit and thereafter at every HPC engine shop visit, perform an angled ultrasonic scan inspection (AUSI) of the affected HPC IBR–7 or HPC IBR–8, as applicable, for cracks in accordance with the Accomplishment Instructions, paragraph 4.E.(1) or 4.E.(2), of PW Alert Service Bulletin (ASB) PW1000G–C–72–00–0224–00A–930A–D, Issue No: 001, dated November 3, 2023.

(2) For Group 1 and Group 2 engines with an installed HPT 1st-stage hub having P/N 30G7301 or an HPT 2nd-stage hub having P/N 30G6602, before exceeding the applicable compliance time in Table 1 to paragraph (h)(2) of this AD, except as required by paragraphs (g)(1) and (2) and paragraph (h)(6) of this AD, perform an AUSI of the affected HPT 1st-stage hub or HPT 2nd-stage hub, as applicable, for cracks in accordance with the Accomplishment Instructions, paragraph 1.D.(7)(a) or 1.D.(7)(b) of PW ASB PW1000G–C–72–00–0225–00A–930A–D Issue No: 001, dated November 3, 2023 (PW ASB PW1000G–C–72–00–0225–00A–930A–D). Thereafter, repeat the AUSI at the applicable interval in Table 1 to paragraph (h)(2) of this AD.

TABLE 1 TO PARAGRAPH (h)(2)—AUSI COMPLIANCE TIMES

Engine group	AUSI performed prior to effective date of this AD	Compliance time	Repetitive interval
1	No	Before accumulating 3,800 cycles since new (CSN) or within 100 flight cycles (FCs) after the effective date of this AD, whichever occurs later.	Thereafter at each HPT engine shop visit or before exceeding 3,800 FCs from the last AUSI of the affected hub, whichever occurs first.
1	Yes	At the next HPT engine shop visit, not to exceed 3,800 FCs since the previous AUSI, or within 100 FCs after the effective date of this AD, whichever occurs later.	Thereafter at each HPT engine shop visit or before exceeding 3,800 FCs from the last AUSI of the affected hub, whichever occurs first.
2	No	Before accumulating 2,800 CSN or within 100 FCs after the effective date of this AD, whichever occurs later.	Thereafter at each HPT engine shop visit or before exceeding 2,800 FCs from the last angled AUSI of the affected hub, whichever occurs first.
2	Yes	At the next HPT engine shop visit, not to exceed 2,800 FCs since the previous AUSI, or within 100 FCs after the effective date of this AD, whichever occurs later.	Thereafter at each HPT engine shop visit or before exceeding 2,800 FCs from the last AUSI of the affected hub, whichever occurs first.

(3) For Group 1 and Group 2 engines with an installed part listed in Table 2 to paragraph (h)(3) of this AD, at the next HPT engine shop visit not to exceed the applicable cyclic limit specified in Table 2 to paragraph (h)(3) of this AD, or 100 FCs after the effective date of the AD, whichever occurs later, except as required by paragraphs (h)(5) and (7) of this AD, remove the affected part from service and replace with a part eligible for installation.

TABLE 2 TO PARAGRAPH (h)(3)—PART REPLACEMENT COMPLIANCE TIMES

Engine group	AUSI performed prior to effective date of this AD	Part name	Part number	Cyclic limit
1	Yes	HPT 1st-stage hub	30G4201 or 30G6201	3,800 FCs since last AUSI.
	No	HPT 1st-stage hub	30G4201 or 30G6201	3,800 CSN.
	Yes	HPT 2nd-stage hub	30G3902 or 30G5502	3,800 FCs since last AUSI or 7,000 CSN whichever comes first.
	No	HPT 2nd-stage hub	30G3902 or 30G5502	3,800 CSN.
2	Yes	HPT 1st-stage hub	30G4201 or 30G6201	2,800 FCs since last AUSI.
	No	HPT 1st-stage hub	30G4201 or 30G6201	2,800 CSN.
	Yes	HPT 2nd-stage hub	30G3902 or 30G5502	2,800 FCs since last AUSI or 5,000 CSN whichever comes first.
	No	HPT 2nd-stage hub	30G3902 or 30G5502	2,800 CSN.

(4) For Group 1 and Group 2 engines with an installed part listed in Table 3 to paragraph (h)(4) of this AD, before exceeding the applicable compliance times specified in Table 3 to paragraph (h)(4) of this AD, remove the affected part from service and replace with a part eligible for installation.

TABLE 3 TO PARAGRAPH (h)(4)—PART REPLACEMENT COMPLIANCE TIMES

Engine group	Part name	Part number	Compliance time
1 and 2	HPC rear hub ...	30G4008	At the next HPC shop visit or HPT shop visit, whichever occurs first after the effective date of this AD.
1 and 2	HPT 1st-stage front air seal.	30G3994 or 30G4674	At the next HPT engine shop visit.
	HPT 2nd-stage rear air seal.	30G2452.	
	HPT 1st-stage blade retaining plate.	30G2446.	
	HPT 2nd-stage blade retaining plate.	30G2447.	
1	HPC rear hub ...	30G8208	Before accumulating 7,000 CSN or within 100 FCs after the effective date of this AD, whichever occurs later.
	HPC IBR–7	30G2307 or 30G4407.	
	HPC IBR–8	30G5608 or 30G5908 or 30G8908.	
	HPT 1st-stage hub.	30G7301.	
	HPT 2nd-stage hub.	30G6602.	
2	HPC rear hub ...	30G8208	Before accumulating 5,000 CSN or within 100 FCs after the effective date of this AD, whichever occurs later.
	HPC IBR–7	30G2307 or 30G4407.	
	HPC IBR–8	30G5608 or 30G5908 or 30G8908.	
	HPT 1st-stage hub.	30G7301.	
	HPT 2nd-stage hub.	30G6602.	

(5) For Group 1 and Group 2 engines with an installed HPT 1st-stage hub having P/N 30G6201 or an HPT 2nd-stage hub having P/N 30G5502 and an S/N listed in Tables 1, 2, 3, or 4 of PW SI NO. 149F–23 that has not had an AUSI performed before the effective date of this AD, before further flight, remove the affected hub from service.

(6) For Group 1 and Group 2 engines with an installed HPT 1st-stage hub having P/N 30G7301 or an HPT 2nd-stage hub having P/N 30G6602 with an S/N listed in Tables 1, 2, 3, or 4 of PW SI NO. 198F–23, dated November 3, 2023, within 100 FC after the effective date of this AD, perform an AUSI of the affected hub for cracks in accordance with the Accomplishment Instructions, paragraph 1.D.(7)(a) or 1.D.(7)(b) of PW ASB PW1000G–C–72–00–0225–00A–930A–D.

(7) For Group 1 and Group 2 engines with an installed HPT 1st-stage hub having P/N 30G6201 or an HPT 2nd-stage hub having P/N 30G5502 with an S/N listed in Tables 1, 2, 3, or 4 of PW SI NO. 198F–23, dated November 3, 2023, within 100 FC after the effective date of this AD, remove the hub from service and replace with a part eligible for installation.

(8) If any crack is found during any inspection required by this AD, before further flight, remove the affected part from service and replace with a part eligible for installation.

(9) If an affected part has accumulated 100 FCs or less since the last AUSI, reinspection is not required provided that the part was not damaged during removal from the engine.

(i) Definitions

(1) For the purposes of this AD, ''Group 1 engines'' are IAE LLC Model PW1122G–JM, PW1124G1–JM, PW1124G–JM, PW1127G–JM, PW1127G1–JM, and PW1127GA–JM engines.

(2) For the purposes of this AD, ''Group 2 engines'' are IAE LLC Model PW1129G–JM, PW1130G–JM, PW1133G–JM, PW1133GA–JM, PW1428G–JM, PW1428GA–JM, PW1428GH–JM, PW1431G–JM, PW1431GA–JM, and PW1431GH–JM engines.

(3) For the purposes of this AD, an ''HPC engine shop visit'' is the induction of an engine into the shop for maintenance involving the separation of the H-flange.

(4) For the purposes of this AD, an ''HPT engine shop visit'' is the induction of an engine into the shop for maintenance involving the separation of the M-flange.

(5) For the purposes of this AD, a ''part eligible for installation'' is:

(i) An HPC IBR–7 having P/N 30G2307 or 30G4407, that has passed the AUSI required by paragraph (h)(1) of this AD or later approved P/N.

(ii) An HPC IBR–8 having, P/N 30G5608, 30G5908, or 30G8908 that has passed the AUSI required by paragraph (h)(1) of this AD or later approved P/N.

(iii) An HPT 1st-stage hub having P/N 30G7301 that has passed the AUSI required by paragraph (h)(2) of this AD or later approved P/N.

(iv) An HPT 2nd-stage hub having P/N 30G6602 that has passed the AUSI required by paragraph (h)(2) of this AD or later approved P/N.

(v) An HPC rear hub, P/N 30G8208 or later approved P/N.

(vi) An HPT 1st-stage front air seal, P/N 30G4617 or later approved P/N.

(vii) An HPT 2nd-stage rear air seal, P/N 30G4811 or later approved P/N.

(viii) An HPT 1st-stage blade retaining plate, P/N 30G6059, 31G0018 or later approved P/N.

(j) Credit for Previous Actions

This paragraph provides credit for the actions specified in paragraph (g)(1) and (2) of this AD, if those actions were performed before the effective date of this AD using PW Service Bulletin PW1000G–C–72–00–0188–00A–930A–D, Issue No: 001, dated September 13, 2021. This service information is not incorporated by reference in this AD.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520 Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as

appropriate. If sending information directly to the manager of the AIR–520 Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (l)(1) of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(l) Additional Information

(1) For more information about this AD, contact Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7655; email: *carol.nguyen@faa.gov*.

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(6) and (7) of this AD.

(m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) Pratt & Whitney (PW) Alert Service Bulletin PW1000G–C–72–00–0224–00A–930A–D, Issue No: 001, dated November 3, 2023.

(ii) PW Alert Service Bulletin PW1000G–C–72–00–0225–00A–930A–D, Issue No: 001, dated November 3, 2023.

(iii) PW Special Instruction NO. 198F–23, dated November 3, 2023.

(4) The following service information was approved for IBR on August 28, 2023 (88 FR 56999, August 22, 2023).

(i) PW Special Instruction NO. 149F–23, dated August 4, 2023.

(ii) [Reserved]

(5) The following service information was approved for IBR on November 7, 2022 (87 FR 59660, October 3, 2022; corrected October 24, 2022 (87 FR 64156)).

(i) PW Service Bulletin PW1000G–C–72–00–0188–00A–930A–D, Issue No: 002, dated July 8, 2022.

(ii) [Reserved]

(6) For PW service information identified in this AD, contact International Aero Engines, LLC, 400 Main Street, East Hartford, CT 06118; phone: (860) 565–0140; email: *help24@pw.utc.com;* website: *connect.prattwhitney.com.*

(7) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(8) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit: *www.archives.gov/federal-register/cfr/ibr-locations* or email: *fr.inspection@nara.gov.*

Issued on December 21, 2023.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–28693 Filed 12–22–23; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2237; Project Identifier AD–2023–01057–E]

RIN 2120–AA64

Airworthiness Directives; International Aero Engines, LLC Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; withdrawal.

SUMMARY: The FAA is withdrawing a notice of proposed rulemaking (NPRM) that proposed to supersede Airworthiness Directive (AD) 2022–19–15, which applies to certain International Aero Engines, LLC (IAE LLC) Model PW1100G series engines; and AD 2023–16–07, which applies to certain IAE LLC Model PW1100G series engines and PW1400G series engines. AD 2022–19–15 requires an angled ultrasonic inspection (AUSI) of the high-pressure turbine (HPT) 1st-stage disk and HPT 2nd-stage disk, and replacement if necessary. AD 2023–16–07 requires an AUSI of the HPT 1st-stage hub (also known as the HPT 1st-stage disk) and HPT 2nd-stage hub (also known as the HPT 2nd-stage disk) for cracks, and replacement if necessary, which is terminating action for AD 2022–19–15. The NPRM was prompted by a manufacturer investigation that determined an increased risk of powder metal anomalies for all powder metal parts in certain powder metal production campaigns, which are susceptible to failure significantly earlier than previously determined. The NPRM would have retained the AUSI requirement for certain HPT 1st-stage and HPT 2nd-stage hubs from AD 2023–16–07. The NPRM would also have required performing an AUSI of the HPT 1st-stage hub, HPT 2nd-stage hub, high-pressure compressor (HPC) 7th-stage integrally bladed rotor (IBR–7), and HPC 8th-stage integrally bladed rotor (IBR–8) for cracks and replacement if necessary. The NPRM would also have required accelerated replacement of the HPC IBR–7, HPC IBR–8, HPC rear hub, HPT 1st-stage hub, HPT 1st-stage air seal, HPT 1st-stage blade retaining plate, HPT 2nd-stage hub, HPT 2nd-stage blade retaining plate, and HPT 2nd-stage rear seal. Since issuance of the NPRM, the FAA has received information that an error was inadvertently included in the compliance times for some of the HPT 1st-stage and 2nd-stage hubs, which would have required removal significantly later than necessary. Accordingly, the NPRM is withdrawn.

DATES: As of December 28, 2023, the proposed rule, which was published in the **Federal Register** on December 12, 2023 (88 FR 86088), is withdrawn.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–2237; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD action, the NPRM, any comments received, and other information. The street address for Docket Operations is Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Carol Nguyen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7655; email: *carol.nguyen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued an NPRM that proposed to amend 14 CFR part 39 by adding an AD that would apply to certain IAE LLC Model PW1122G–JM, PW1124G1–JM, PW1124G–JM, PW1127G–JM, PW1127G1–JM, PW1127GA–JM, PW1129G–JM, PW1130G–JM, PW1133G–JM, PW1133GA–JM, PW1428G–JM, PW1428GA–JM, PW1428GH–JM, PW1431G–JM, PW1431GA–JM, and PW1431GH–JM engines. The NPRM was published in the **Federal Register** on December 12, 2023 (88 FR 86088). The NPRM was prompted by an analysis of an event involving an IAE LLC Model PW1127GA–JM engine, which experienced failure of a HPC IBR–7 that resulted in an engine shutdown and aborted takeoff; and the FAA's determination to supersede AD 2022–19–15, Amendment 39–22184 (87 FR 59660, October 3, 2022; corrected October 24, 2022 (87 FR 64156)) (AD 2022–19–15), and AD 2023–16–07, Amendment 39–22526 (88 FR 56999, August 22, 2023) (AD 2023–16–07). The NPRM proposed to retain the AUSI requirement for certain HPT 1st-stage and HPT 2nd-stage hubs from AD 2023–16–07. The NPRM also proposed to require performing an AUSI of the HPT

1st-stage hub, HPT 2nd-stage hub, HPC IBR–7, and HPC IBR–8 for cracks and replacement if necessary. The NPRM also proposed to require accelerated replacement of the HPC IBR–7, HPC IBR–8, HPC rear hub, HPT 1st-stage hub, HPT 1st-stage air seal, HPT 1st-stage blade retaining plate, HPT 2nd-stage hub, HPT 2nd-stage blade retaining plate, and HPT 2nd-stage rear seal.

The proposed actions were intended to address failure of the HPT 1st-stage hub, HPT 2nd-stage hub, HPC IBR–7, and HPC IBR–8, which could result in uncontained hub failure, release of high-energy debris, damage to the engine, damage to the airplane, and loss of the airplane.

Actions Since the NPRM Was Issued

Since issuance of the NPRM, the FAA has received information from Pratt & Whitney that an error was inadvertently included in the removal times for some of the HPT 1st-stage and 2nd-stage hubs, which would have required removal significantly later than necessary. Because the removal timeframe needed to be shortened, the FAA determined it is necessary to withdraw the NPRM and issue a new NPRM for the unsafe condition with the correct compliance times.

Withdrawal of the NPRM constitutes only such action and does not preclude the FAA from further rulemaking on this issue, nor does it commit the FAA to any course of action in the future.

Comments

The FAA received comments on the NPRM. However, due to the FAA's determination that it is necessary to withdraw and issue a new NPRM, the comments will be copied to Docket No. FAA–2023–2401 and addressed in the final rule for that AD action. Additionally, the FAA requests that the commenters review the new NPRM at Docket No. FAA–2023–2401.

FAA's Conclusions

Upon further consideration, the FAA has determined that the NPRM does not adequately address the identified unsafe condition. Accordingly, the NPRM is withdrawn.

Regulatory Findings

Since this action only withdraws an NPRM, it is neither a proposed nor a final rule. This action therefore is not covered under Executive Order 12866, the Regulatory Flexibility Act, or DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979).

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Withdrawal

■ Accordingly, the notice of proposed rulemaking (Docket No. FAA–2023–2237), which was published in the **Federal Register** on December 12, 2023 (88 FR 86088), is withdrawn.

Issued on December 21, 2023.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–28703 Filed 12–22–23; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2402; Project Identifier MCAI–2023–00370–T]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Bombardier, Inc., Model CL–600–2B16 (601–3A, 601–3R, and 604 Variants) airplanes. This proposed AD was prompted by a report indicating that a new filter plate connector for the nose wheel steering (NWS) system electronic control module (ECM) does not meet certain certification requirements. This proposed AD would require replacing all affected non-compliant ECMs. This proposed AD would also prohibit the installation of affected parts under certain conditions. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by February 12, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–2402; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference

- For service information identified in this NPRM, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website *bombardier.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

FOR FURTHER INFORMATION CONTACT: Steven Dzierzynski, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228–7300; email: *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–2402; Project Identifier MCAI–2023–00370–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each

substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Steven Dzierzynski, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228–7300; email: *9-avs-nyaco-cos@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2023–14R1, dated May 15, 2023 (Transport Canada AD CF–2023–14R1) (also referred to after this as the MCAI), to correct an unsafe condition on certain Bombardier, Inc., Model CL–600–2B16 (601–3A, 601–3R, and 604 Variants) airplanes. The MCAI states that the manufacturer of the NWS system ECM, part number (P/N) 601–86100–27, introduced a new filter plate connector that does not meet the certification requirements related to the susceptibility of electronic components to high intensity radiated field. This non-compliant filter plate connector, if not replaced, could result in a malfunction of the NWS system causing potential un-commanded steering or lateral excursion from the runway.

The FAA is proposing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–2402.

Related Service Information Under 1 CFR Part 51

The FAA reviewed the following Bombardier service information.

- Service Bulletin 604–32–032, dated October 18, 2021.
- Service Bulletin 605–32–009, dated October 18, 2021.
- Service Bulletin 650–32–006, dated October 18, 2021.

This service information specifies procedures for removing and replacing all affected non-compliant ECMs, P/N 601–86100–27. These documents are distinct since they apply to different airplane configurations.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the service information already described. This proposed AD would also prohibit the installation of affected parts under certain conditions.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 164 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
6 work-hours × $85 per hour = $510	$75,972	$76,482	$12,543,048

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

Bombardier, Inc.: Docket No. FAA–2023–2402; Project Identifier MCAI–2023–00370–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by February 12, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc., Model CL–600–2B16 (601–3A, 601–3R, and 604 Variants) airplanes, certificated in any category, with serial numbers 5301 through 5665 inclusive, 5701 through 5990 inclusive, and 6050 and subsequent.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Unsafe Condition

This AD was prompted by a report indicating that a new filter plate connector for the nose wheel steering (NWS) system electronic control module (ECM) does not meet certain certification requirements. The FAA is issuing this AD to address this non-compliant filter plate connector, which, if not replaced, could result in a malfunction of the NWS system causing potential uncommanded steering or lateral excursion from the runway.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Verification of Airplane Technical Records

Within 24 months after the effective date of this AD: Inspect the serial number of the ECM, P/N 601–86100–27, in accordance with Section 2.B. Part A of the Accomplishment Instructions of the applicable service information listed in figure (1) to the introductory text of paragraph (g) of this AD to determine if the serial number of the ECM, part number (P/N) 601–86100–27, is listed in Table 1 of Section 1.A. of the applicable service information listed in figure (1) to the introductory text of paragraph (g) of this AD. A review of maintenance records is also acceptable if the serial number of the ECM can be conclusively determined from that review.

Model	Serial Numbers	Applicable Bombardier Service Bulletin
CL-600-2B16	6050 and subsequent	650-32-006, dated October 18, 2021
CL-600-2B16	5701 through 5990	605-32-009, dated October 18, 2021
CL-600-2B16	5301 through 5665	604-32-032, dated October 18, 2021

(1) If the serial number of the ECM is listed in Table 1 of Section 1.A. of the applicable service information or is not reidentified on the nameplate as SB–1, then the actions of paragraph (h) of this AD are required.

(2) If the serial number of the ECM is not listed in Table 1 of Section 1.A. of the applicable service information or is reidentified on the nameplate as SB–1, then the actions of paragraph (h) of this AD are not required.

(h) Replacement

For airplanes identified in paragraph (g)(1) of this AD: Do the actions specified in paragraphs (h)(1) and (2) of this AD.

(1) Within 24 months after the effective date of this AD: Replace the ECM, P/N 601–86100–27, identified in paragraph (g)(1) of this AD, in accordance with Section 2.C. Part B of the Accomplishment Instructions of the applicable service information listed in figure 1 to the introductory text of paragraph (g) of this AD.

(2) Prior to return to service, complete the operational test of the NWS system in accordance with Section 2.D. of the Accomplishment Instructions of the applicable service information listed in figure 1 to the introductory text of paragraph (g) of this AD.

(i) Parts Installation Limitation

As of the effective date of this AD, it is prohibited to install ECM, P/N 601–86100–27, as a replacement part, if the serial number is listed in Table 1 of Section 1.A. of the applicable service information listed in figure 1 to the introductory text of paragraph (g) of this AD, unless the ECM has been reidentified with SB–1 on the name plate.

(j) Additional AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager, International Validation Branch, mail it to the address identified in paragraph (k)(2) of this AD or email to: *9-avs-nyaco-cos@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or Transport Canada; or Bombardier, Inc.'s Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(k) Additional Information

(1) Refer to Transport Canada AD CF–2023–14R1, dated May 15, 2023, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–2402.

(2) For more information about this AD, contact Steven Dzierzynski, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228–7300; email: *9-avs-nyaco-cos@faa.gov.*

(l) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Bombardier Service Bulletin 604–32–032, dated October 18, 2021.

(ii) Bombardier Service Bulletin 605–32–009, dated October 18, 2021.

(iii) Bombardier Service Bulletin 650–32–006, dated October 18, 2021.

(3) For service information identified in this AD, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website *bombardier.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the

availability of this material at the FAA, call 206–231–3195.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.*

Issued on December 21, 2023.

Caitlin Locke,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2023–28590 Filed 12–27–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–121010–17]

RIN 1545–BO11

Bad Debt Deductions for Regulated Financial Companies and Members of Regulated Financial Groups

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that would provide guidance regarding whether a debt instrument is worthless for Federal income tax purposes. The proposed regulations are necessary to update the standard for determining when a debt instrument held by a regulated financial company or a member of a regulated financial group will be conclusively presumed to be worthless. The proposed regulations will affect regulated financial companies and members of regulated financial groups that hold debt instruments.

DATES: Written or electronic comments and requests for a public hearing must be received by February 26, 2024.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically via the Federal eRulemaking Portal at *https://www.regulations.gov* (indicate IRS and REG–121010–17) by following the online instructions for submitting comments. Requests for a public hearing must be submitted as prescribed in the ''Comments and Requests for a Public Hearing'' section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted to the IRS's public docket. Send paper submissions to: CC:PA:01:PR (REG–121010–17), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stephanie D. Floyd at (202) 317–7053; concerning submissions of comments and requesting a hearing, Vivian Hayes at (202) 317–6901 (not toll-free numbers) or by email to *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 166 of the Internal Revenue Code (Code). These proposed amendments (proposed regulations) would update the standard in the current regulations under § 1.166–2 (existing regulations) for determining when a debt instrument held by a regulated financial company or a member of a regulated financial group will be conclusively presumed to be worthless.

1. Existing Rules

Section 166(a)(1) provides that a deduction is allowed for any debt that becomes worthless within the taxable year. Section 166(a)(2) permits the Secretary of the Treasury or her delegate (Secretary) to allow a taxpayer to deduct a portion of a partially worthless debt that does not exceed the amount charged-off within the taxable year. The existing regulations do not define ''worthless.'' In determining whether a debt is worthless in whole or in part, the IRS considers all pertinent evidence, including the value of any collateral securing the debt and the financial condition of the debtor. *See* § 1.166–2(a). The existing regulations provide further that, when the surrounding circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, legal action is not required in order to determine that the debt is worthless. *See* § 1.166–2(b).

The existing regulations provide two alternative conclusive presumptions of worthlessness for bad debt. First, § 1.166–2(d)(1) generally provides that if a bank or other corporation subject to supervision by Federal authorities, or by State authorities maintaining substantially equivalent standards, charges off a debt in whole or in part, either (1) in obedience to the specific orders of such authorities, or (2) in accordance with the established policies of such authorities, and such authorities at the first audit subsequent to the charge-off confirm in writing that the charge-off would have been subject to specific orders, then the debt is conclusively presumed to have become worthless, in whole or in part, to the extent charged off during the taxable year.

Second, § 1.166–2(d)(3) generally provides that a bank (but not other corporations) subject to supervision by Federal authorities, or by State authorities maintaining substantially equivalent standards, may elect to use a method of accounting that establishes a conclusive presumption of worthlessness for debts, provided the bank's supervisory authority has made an express determination that the bank maintains and applies loan loss classification standards that are consistent with the regulatory standards of that supervisory authority. Section 1.166–2(d)(1) and (3) are collectively referred to as the ''Conclusive Presumption Regulations.''

2. Generally Accepted Accounting Principles Prior to the Current Expected Credit Loss Revisions

For financial reporting purposes, financial institutions in the United States follow the U.S. Generally Accepted Accounting Principles (GAAP) issued by the Financial Accounting Standards Board (FASB). The long-standing GAAP model for recognizing credit losses is referred to as the ''incurred loss model'' because it delays recognition of credit losses until it is probable that a loss has been incurred. Under the incurred loss model, an entity considers only past events and current conditions in measuring the incurred credit loss. This method does not require or allow the incorporation of economic forecasts, or consideration of industry cycles. The incurred loss model permits institutions to use various methods to estimate credit losses, including historical loss methods, roll-rate methods, and discounted cash flow methods. The GAAP accounting for credit losses has been revised with the introduction of the current expected credit loss methodology for estimating allowance for credit losses, as further described in section 3 of this Background.

Under the GAAP incurred loss model, an institution must first assess whether a decline in fair value of a debt security below the amortized cost of the security is a temporary impairment or other than temporary impairment (OTTI). If an entity intends to sell the security or more likely than not will be required to

sell the security before recovery of its amortized cost basis less any current-period credit loss, OTTI will be recognized in earnings equal to the difference between the investment's amortized cost basis and its fair value at the balance sheet date. In assessing whether the entity more likely than not will be required to sell the security before recovery of its amortized cost basis less any current period credit losses, an entity considers various factors such as the payment structure of the debt security, adverse conditions related to the security, or the length of time and the extent to which the fair value has been less than the amortized cost basis.

By contrast, if an entity determines OTTI exists but does not intend to sell the debt security or it is more likely than not that the entity will not be required to sell the debt security prior to its anticipated recovery, the impairment is separated into two parts: the portion of OTTI related to credit loss on a debt security (Credit-Only OTTI) and the portion of OTTI related to other factors but not credit (Non-Credit OTTI). Credit-Only OTTI will be recognized in earnings on the income statement, but Non-Credit OTTI will be reported on the balance sheet as Other Comprehensive Income. FASB Staff Positions, FSP FAS 115–2 and 124–2, Recognition and Presentation of Other-Than-Temporary Impairments (later codified as part of ASC 320).

3. The Current Expected Credit Loss Standard

On June 16, 2016, FASB introduced a new standard, the Accounting Standards Update (ASU) No. 2016–13, *Financial Instruments—Credit Losses (Topic 326): Measurement of Credit Losses on Financial Instruments* (Update). The Update, which replaces the incurred loss model in GAAP, became effective for many entities for fiscal years beginning after December 15, 2019, and became generally effective for all entities for fiscal years beginning after December 15, 2022.

The Update was in response to concerns by regulators that the incurred loss model under GAAP restricted the ability to record credit losses that are expected but that do not yet meet the probable threshold. The Update is based on a current expected credit loss model (CECL Model), which generally requires the recognition of expected credit loss (ECL) in the allowance for credit losses upon initial recognition of a financial asset, with the addition to the allowance recorded as an offset to current earnings. Subsequently, the ECL must be assessed each reporting period, and both negative and positive changes to the ECL must be recognized through an adjustment to the allowance and to earnings. ASC 326–20–30–1; ASC 326–20–35–1. In estimating the ECL under the CECL Model, institutions must consider information about past events, current conditions, and reasonable and supportable forecasts relevant to assessing the collectability of the cash flow of financial assets. The CECL Model does not prescribe the use of specific estimation methods for measuring the ECL. However, an entity will need to make adjustments to provide an estimate of the ECL over the remaining contractual life of an asset and to incorporate reasonable and supportable forecasts about future economic conditions in the calculations. A charge-off of a financial asset, which may be full or partial, is taken out of the allowance in the period in which a financial asset is deemed uncollectible. ASC 326–20–35–8. At that time the carrying value of the financial asset is also written down. See ASC 326–20–55–52. The ECL recognized under the CECL Model cannot be used to determine bad debt deductions under section 166 because the ECL recognized under the CECL Model would be a current deduction for estimated future losses.

4. Insurance Company Financial Accounting

Publicly traded insurance companies report their financial transactions and losses to the Securities and Exchange Commission in accordance with GAAP. Privately held insurance companies may also report their financial transactions and losses in accordance with GAAP. However, in the United States, all insurance companies, whether publicly traded or privately held, are regulated by State governments in the States in which they are licensed to do business and are required by State law to prepare financial statements in accordance with statutory accounting principles (Statements of Statutory Accounting Principles, known as SSAPs or SAPs). SSAPs serve as a basis for preparing financial statements for insurance companies in accordance with statutes or regulations promulgated by various States. SSAPs establish guidelines that must be followed when an asset is impaired. SSAPs are detailed in the National Association of Insurance Commissioner's (NAIC's) Accounting Practices and Procedures Manual. Generally, the NAIC's guidelines require the carrying value of an asset to be written down if the loss of principal is OTTI. The OTTI standard is found in several different statutory accounting provisions, including SSAP 43R (loan-backed and structured securities) and SSAP 26 (bonds, excluding loan-backed and structured securities).

5. IRS Directives

In 2012, in response to comments regarding the significant burden on both insurance companies and the IRS's Large Business and International Division (LB&I) in dealing with audits relating to the accounting of loss assets, the IRS issued an insurance industry directive to its LB&I examiners. See *I.R.C. § 166: LB&I Directive Related to Partial Worthlessness Deduction for Eligible Securities Reported by Insurance Companies,* LB&I 04–0712–009 (July 30, 2012) (Insurance Directive). The Insurance Directive states that LB&I examiners would not challenge an insurance company's partial worthlessness deduction under section 166(a)(2) for the amount of the SSAP 43R—Revised Loan-Backed and Structured Securities (September 14, 2009) credit-related impairment charge-offs of ''eligible securities'' as reported according to SSAP 43R on its annual statement if the company follows the procedure set forth in that directive. The definition of ''eligible securities'' in the Insurance Directive covers investments in loan-backed and structured securities within the scope of SSAP 43R, subject to section 166 and not subject to section 165(g)(2)(C) of the Code, including real estate mortgage investment conduit regular interests. Thus, the Insurance Directive allowed insurance companies to use the financial accounting standard for tax purposes in limited circumstances regardless of whether the regulatory standard is precisely the same as the tax standard for worthlessness under section 166.

In 2014, the IRS issued another industry directive to LB&I examiners regarding bad debt deductions claimed under section 166 by a bank or bank subsidiary. See *LB&I Directive Related to § 166 Deductions for Eligible Debt and Eligible Debt Securities,* LB&I–04–1014–008 (October 24, 2014) (Bank Directive). Unlike insurance companies, banks generally determine loss deductions for partial and wholly worthless debts in the same manner for GAAP and regulatory purposes. The Bank Directive generally allowed for loss deductions for partial and wholly worthless debts to follow those reported for GAAP and regulatory purposes.

6. Summary of Comments Received in Response to Notice 2013–35

In 2013, the IRS issued Notice 2013–35, 2013–24 I.R.B. 1240, requesting comments on the Conclusive Presumption Regulations. The Treasury

Department and the IRS noted that since the adoption of the Conclusive Presumption Regulations, there have been significant changes made to the regulatory standards relevant for loan charge-offs. In light of those changes, Notice 2013–35 sought comments on whether (1) changes that have occurred in bank regulatory standards and processes since adoption of the Conclusive Presumption Regulations require amendment of those regulations, and (2) application of the Conclusive Presumption Regulations continues to be consistent with the principles of section 166. Comments were also sought on the types of entities that are permitted, or should be permitted, to apply a conclusive presumption of worthlessness.

Commenters responded that the Conclusive Presumption Regulations are outdated and contain requirements for a bad debt deduction that taxpayers can no longer satisfy. For example, one commenter noted that § 1.166–2(d)(1) is unusable by community banks because banking regulators will not issue written correspondence confirming that a charge-off is being made for either of the reasons set forth in § 1.166–2(d)(1). A commenter similarly noted that regulators generally no longer provide specific orders on a loan-by-loan basis and may never confirm the appropriateness of a charge-off in writing. Another commenter noted that for certain banks the election under § 1.166–2(d)(3) was automatically revoked under § 1.166–2(d)(3)(iv)(C) during the 2008 financial crisis because bank examiners ordered greater charge-offs than those initially taken by the banks, and then could not provide the required express determination letter stating that the banks maintained and applied loan loss classification standards consistent with the regulatory standards of the supervisory authority.

Commenters noted the advantages of retaining a conclusive presumption of worthlessness. One commenter stated that a conclusive presumption helps to avoid costly factual disputes between the IRS and taxpayers. Another commenter stated that it is in the best interests of all stakeholders to ensure that duplicative efforts by Federal and State bank regulators and the IRS do not occur. A commenter suggested that the IRS follow determinations made by regulators that routinely and thoroughly examine the financial and accounting records and processes of financial institutions such as banks, bank holding companies, and their non-bank subsidiaries. Another commenter noted that for decades virtually all community banks have conformed their losses on loans for income tax purposes to losses recorded for regulatory reporting purposes. Several commenters recommended that § 1.166–2(d)(1) and (3) should be replaced with a single conclusive presumption rule.

Commenters requested that the Conclusive Presumption Regulations be revised to apply to any institution that is subject to consolidated supervision by the Board of Governors of the Federal Reserve System (Federal Reserve), including systemically important financial institutions (SIFIs) and subsidiaries and affiliates of SIFIs, because these institutions are required to follow a strict process for determining the amounts of the allowance for credit losses under GAAP for financial reporting purposes and the Federal Reserve's examination will focus on the consistent application and adherence to this process. Another commenter suggested that the election under § 1.166–2(d)(3) should be extended to bank holding companies and their nonbank subsidiaries, and potentially to other regulated financial institutions that are examined by the same primary supervisory authority or regulator.

Commenters stated that the GAAP loss standard and the accounting standards used by insurance companies for determining whether a debt is worthless are sufficiently similar to the tax standards for worthlessness under section 166 and, therefore, should be used in formulating a revised conclusive presumption rule. Commenters argued that in most cases, any divergence between the various standards will not be significant enough to result in a material acceleration of loss recognition for Federal income tax purposes. Commenters specifically requested that the Conclusive Presumption Regulations be revised to include all insurance company debts, not just the eligible securities covered in the Insurance Directive. Commenters noted that, in applying the OTTI standard set forth in the SSAPs, insurers consider similar factors to the ones examined under the tax rules such as the adequacy of the collateral or the income stream in determining whether a debt is worthless for purposes of section 166. Commenters stated that a critical condition for coverage under the existing regulations is whether Federal or State regulators have the authority to compel the charge-off on the financial statements of the company. Commenters said that State insurance regulators have this authority since they can mandate a charge-off if an insurance company has not complied with the State law accounting requirement that requires the charge-off.

Commenters varied in their recommendations of what process the IRS should require in revised conclusive presumption regulations to verify that the regulated entity applied appropriate regulatory standards in taking a charge-off. Some commenters recommended that the IRS require an attestation from the taxpayer that the taxpayer has reported worthless debts consistently for tax and regulatory reporting purposes similar to the taxpayer self-certification statement required under the Insurance Directive. Commenters stated that a new self-certification requirement adopted by the IRS could replace the requirement in the existing regulations to obtain written confirmation from regulators. Another commenter suggested that a taxpayer claiming the benefit of the conclusive presumption should file a signed statement with its tax return listing the taxpayer's Federal and State regulators and stating that, for each bad debt deducted under section 166 on the tax return, the taxpayer has charged off the same amount on its financial statements.

Explanation of Provisions

1. Rationale for the Proposed Amendments to § 1.166–2(d)

Regulated financial companies and members of regulated financial groups are generally subject to capital requirements, leverage requirements, or both. A tension exists between the incentives of regulated entities and the incentives of their regulators. An entity that is subject to regulatory capital requirements has an incentive not to charge-off debt assets prematurely, in order to preserve the amount of its capital. Conversely, a regulator that relies on capital or leverage requirements is concerned with ensuring that capital is not overstated, and therefore has an incentive to ensure that regulated entities do not defer charge-offs of losses on loans and other debt instruments. Regulators have provided guidance to those financial companies to ensure they charge off debt losses appropriately.[1] This tension

[1] *See, for example, Interagency Policy Statement on Allowances for Credit Losses,* 85 FR 32991 (June 1, 2020) (providing guidance to financial institutions from the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the National Credit Union Administration on allowances for credit losses in response to changes to GAAP); *Regulatory Capital Rule: Implementation and Transition of the Current Expected Credit Losses Methodology for Allowances and Related Adjustments to the Regulatory Capital Rule and Conforming Amendments to Other Regulations,* 84 FR 4222 (2019) (adopting final rule to address changes to credit loss accounting under

results in a balance with respect to the timing of charge-offs.

The Treasury Department and the IRS believe that regulated financial companies and members of regulated financial groups described in the proposed regulations are subject to regulatory and accounting standards for charge-offs that are sufficiently similar to the Federal income tax standards for determining worthlessness under section 166. Both GAAP and the SSAPs use a facts and circumstance analysis that takes into account all available information related to the collectability of the debt. The analysis considers the value of any collateral securing the debt and the financial condition of the debtor, which are factors that are also evaluated under the tax rules for determining worthlessness under section 166.

As described in part 5 of the Background, the IRS previously has recognized the significant administrative burden for taxpayers and the IRS to independently determine worthlessness amounts under section 166(a)(2) and has accepted charge-off amounts reported for the incurred loss model previously used by GAAP and for regulatory purposes, as well as in accordance with the SSAPs, as evidence of worthlessness. In the Bank Directive, the IRS accepted charge-off amounts reported by banks and bank subsidiaries for the incurred loss model previously used by GAAP and for regulatory purposes as sufficient evidence of worthlessness. Similarly, in the Insurance Directive, the IRS permitted the use of the insurance company's SSAP 43R credit-related impairment charge-offs for the same securities as reported on its annual statement regardless of whether the regulatory standard is precisely the same as the definition of worthlessness under section 166. Thus, the IRS previously has recognized that the present values of timing differences in taxable income that arise from applying the regulatory standards instead of the tax standards to determine worthlessness are likely to be minor and therefore do not outweigh the costs of having two different standards for book and tax purposes.

Based on the foregoing, the Treasury Department and the IRS believe it is appropriate to provide conclusive presumption rules for regulated financial companies and members of regulated financial groups.

Recently, Congress has directed insurance companies to follow their financial statements prepared in accordance with GAAP in certain circumstances. *See* sections 451(b)(3) and 56A(b) of the Code. Section 451 provides the general rule for the taxable year of inclusion of gross income. Section 451(b) and (c) were amended by section 13221 of Public Law 115–97 (131 Stat. 2054), commonly referred to as the Tax Cuts and Jobs Act. For taxpayers using an accrual method of accounting, section 451(b) requires the recognition of income at the earliest of when the all events test is met or when any item of income is taken into account as revenue in the taxpayer's applicable financial statement (AFS). Section 451(b)(3) defines AFS. Section 451(b)(3) and § 1.451–3(a)(5) list in descending priority the financial statements that can be considered an AFS for purposes of income inclusion under section 451(b) and § 1.451–1(a). Highest priority is given to a financial statement that is certified as being prepared in accordance with GAAP, and lowest priority is assigned to, among other things, non-GAAP financial statements filed with a State government or State agency or a self-regulatory organization including, for example, a financial statement filed with a State agency that regulates insurance companies or the Financial Industry Regulatory Authority.

Section 10101 of Public Law 117–169, 136 Stat. 1818, 1818–1828 (August 16, 2022), commonly referred to as the Inflation Reduction Act of 2022, amended section 55 of the Code to impose a new corporate alternative minimum tax (CAMT) based on the ''adjusted financial statement income'' (AFSI) of an applicable corporation for taxable years beginning after December 31, 2022. For purposes of sections 55 through 59 of the Code, the term AFSI means, with respect to any corporation for any taxable year, the net income or loss of the taxpayer set forth on the taxpayer's AFS of such taxable year, adjusted as provided in section 56A. *See* section 56A(a). Section 56A(b) defines ''applicable financial statement'' by reference to section 451(b)(3) for purposes of determining the adjusted financial statement income on which applicable corporations base their tentative minimum tax under section 55(b). For purposes of section 56A, the term AFS means, with respect to any taxable year, an AFS as defined in section 451(b)(3) or as specified by the Secretary in regulations or other guidance that covers such taxable year. *See* section 56A(b).

The Treasury Department and the IRS believe that, consistent with recent legislation enacted and regulations promulgated in other contexts, for purposes of determining whether a debt instrument is worthless for Federal income tax purposes, insurance companies should first rely on GAAP financial statements that are prioritized in these proposed regulations and then, in the absence of such a GAAP financial statement, should rely on their annual statement.

2. Description of Proposed Amendments to § 1.166–2(d)

These proposed regulations would revise § 1.166–2(d) to permit ''regulated financial companies,'' as defined in proposed § 1.166–2(d)(4)(ii), and members of ''regulated financial groups,'' as defined in proposed § 1.166–2(d)(4)(iii), to use a method of accounting under which amounts charged off from the allowance for credit losses, or pursuant to SSAP standards, would be conclusively presumed to be worthless for Federal income tax purposes (Allowance Charge-off Method). Proposed § 1.166–2(d)(1) would allow these taxpayers to conclusively presume that charge-offs from the allowance for credit losses of debt instruments subject to section 166 or, in the case of insurance companies that do not produce GAAP financial statements for substantive non-tax purposes, charge-offs pursuant to SSAP standards, satisfy the requirements for a bad debt deduction under section 166. The proposed regulations do not address when a debt instrument qualifies as a security within the meaning of section 165(g)(2)(C) and therefore would not change the scope of debt instruments to which section 166 applies.

The definition of a ''regulated financial company'' in proposed § 1.166–2(d)(4)(ii) includes entities that are regulated by insurance regulators and various Federal regulators including the Federal Housing Finance Agency (FHFA) and the Farm Credit Administration (FCA). The Housing and Economic Recovery Act of 2008 established the FHFA as an independent agency responsible for regulating the safety and soundness of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (Government-Sponsored Enterprises, or GSEs). The FHFA has a statutory responsibility to ensure that the GSEs operate in a safe and sound manner, which the FHFA accomplishes through supervision and regulation, including the supervision and regulation of accounting and disclosure and capital adequacy. Further, the FHFA may order the GSEs to classify and charge-off loans, with loan

GAAP, including banking organizations' implementation of the CECL Model).

classification generally following bank regulatory standards.

The definition of a ''regulated financial company'' in proposed § 1.166–2(d)(4)(ii) also includes Farm Credit System (FCS) institutions subject to the provisions of the Farm Credit Act of 1971. The FCA, an independent Federal agency, is the Federal regulator that examines the safety and soundness of all FCS institutions through regulatory oversight. Including FCS institutions in the definition of regulated financial company is consistent with the existing regulations, which define ''banks'' to include institutions that are subject to the supervision of the FCA. *See* § 1.166–2(d)(4)(i).

The definition of a ''regulated financial company'' in proposed § 1.166–2(d)(4)(ii) does not include credit unions or U.S. branches of foreign banks. The proposed regulations do not address how credit unions or U.S. branches of foreign banks determine charge-offs since the IRS did not receive any comments on this topic in response to Notice 2013–35. Moreover, many credit unions are not subject to Federal income tax. However, the Treasury Department and the IRS request comments regarding whether and, if so, how the proposed regulations should be modified to apply to credit unions or U.S. branches of foreign banks.

The definition of a ''regulated financial company'' in proposed § 1.166–2(d)(4)(ii) also does not include non-bank SIFIs. Treasury and the IRS would need to understand the extent to which prudential or other regulators of non-bank SIFIs apply regulatory standards for worthlessness that are sufficiently close to tax standards before determining whether the rules provided in the proposed regulations should apply to those SIFIs.

The definition of ''regulated insurance company'' in proposed § 1.166–2(d)(4)(vii) does not include corporations that, although licensed, authorized, or regulated by one or more States to sell insurance, reinsurance, or annuity contracts to persons other than related persons (within the meaning of section 954(d)(3) of the Code) in such States, are not engaged in regular issuances of (or subject to ongoing liability with respect to) insurance, reinsurance, or annuity contracts with persons that are not related persons (within the meaning of section 954(d)(3)). The Treasury Department and the IRS request comments regarding whether and how the proposed regulations should be modified to include a reinsurance entity that regularly issues reinsurance contracts only to related persons, provided the risks reinsured are regularly those of persons other than related persons.

The term ''financial statement'' is defined in proposed § 1.166–2(d)(4)(ix) broadly to include a financial statement provided to a bank regulator, along with any amendments or supplements to that financial statement. The Treasury Department and the IRS note that many insurance companies prepare GAAP financial statements. Therefore, the term ''financial statement'' includes a financial statement based on GAAP that is prepared contemporaneously with a financial statement prepared in accordance with the standards set out by the NAIC and given to creditors for purposes of making lending decisions. However, the Treasury Department and the IRS also understand that there are insurance companies that do not prepare GAAP financial statements but, for substantive non-tax purposes, use the SSAP financial statements discussed above, which may not have the functional equivalent of an allowance from which charge-offs are made. In order to extend conformity to insurance company taxpayers that do not prepare GAAP financial statements for substantive non-tax purposes, the Treasury Department and the IRS propose to allow these taxpayers to use their SSAP financial statements for purposes of determining the amount of bad debt deduction under, and in the manner prescribed in, the proposed regulations. Thus, the proposed regulations would direct insurance companies to first rely on a financial statement certified as prepared in accordance with GAAP that is a Form 10–K or an annual statement to shareholders. If no such financial statement exists, the proposed regulations would direct insurance companies to next rely on a financial statement that is based on GAAP that is (1) given to creditors for purposes of making lending decisions, (2) given to equity holders for purposes of evaluating their investments in the regulated financial company or member of a regulated financial group, or (3) provided for other substantial non-tax purposes that also meet certain criteria set forth in these proposed regulations. If an insurance company does not have either of these two types of financial statements based on GAAP, the insurance company would then rely on a financial statement prepared in accordance with the standards set forth by the NAIC and filed with the insurance regulatory authorities of a State that is the principal insurance regulator of the insurance company. Accordingly, the term ''financial statement'' would be defined in the insurance industry context under proposed § 1.166–2(d)(4)(ix)(D) to include a financial statement that is prepared in accordance with standards set out by the NAIC and filed with State insurance regulatory authorities. The Treasury Department and the IRS request comments regarding whether these financial statements should be assigned different levels of priority and on this definition generally.

The term ''charge-off'' is defined in proposed § 1.166–2(d)(4)(i) to mean an accounting entry or set of accounting entries for a taxable year that reduces the basis of the debt when the debt is recorded in whole or in part as a loss asset on the applicable financial statement of the regulated financial company or the member of a regulated financial group for that year. For a regulated financial company that is a regulated insurance company that has as its applicable financial statement a financial statement described in proposed § 1.166–2(d)(4)(ix)(D), the term charge-off is defined in the proposed regulations to mean an accounting entry or set of accounting entries that reduces the debt's carrying value and results in a realized loss or a charge to the statement of operations (as opposed to recognition of unrealized loss) that is recorded on the regulated insurance company's annual statement.

Certain of the commenters suggested that the proposed regulations should extend to GAAP post-impairment accounting for recoveries. Extending tax conformity to GAAP post-impairment accounting for recoveries raises, among other issues, questions about whether GAAP recoveries qualify as tax recoveries, both with regard to amount and timing, and whether GAAP's treatment of recoveries is consistent with the tax recovery payment ordering rules. *See, for example,* section 111, §§ 1.111–1(a)(2), 1.446–2(e), 1.1275–2(a), Rev. Rul. 2007–32, 2007–1 C.B. 1278, and *Hillsboro National Bank* v. *Commissioner,* 460 U.S. 370 (1983). In view of the foregoing, the Treasury Department and the IRS, while welcoming comments on the topic, do not propose extending tax conformity to GAAP post-impairment recovery accounting at this time.

Under the proposed regulations, the Allowance Charge-off Method would be a method of accounting because it would determine the timing of the bad debt deduction. Accordingly, proposed § 1.166–2(d)(2) provides that a change to the Allowance Charge-off Method is a change in method of accounting

requiring consent of the Commissioner under section 446(e).

When the proposed regulations are finalized, those regulated financial companies or members of regulated financial groups that do not presently use or change to the Allowance Charge-off Method would not be entitled to a conclusive presumption of worthlessness and would in most cases be required to use the specific charge-off method for deducting bad debts under section 166(a) and § 1.166–1(a)(1).

3. Proposed Applicability Dates and Reliance on the Proposed Regulations

A. Proposed Applicability Dates of the Final Regulations

Under the proposed applicability date in proposed § 1.166–2(d)(5), the final regulations would apply to charge-offs made by a regulated financial company or a member of a regulated financial group on its applicable financial statement that occur in taxable years ending on or after the date of publication of a Treasury decision adopting those rules as final regulations in the **Federal Register**. However, under proposed § 1.166–2(d)(5), a regulated financial company or a member of a regulated financial group may choose to apply the final regulations, once published in the **Federal Register**, to charge-offs made on its applicable financial statement that occur in taxable years ending on or after December 28, 2023, and before the date of publication of a Treasury decision adopting those rules as final regulations in the **Federal Register**. *See* section 7805(b)(7) of the Code.

B. Reliance on the Proposed Regulations

A regulated financial company or a member of a regulated financial group may rely on proposed § 1.166–2(d) for charge-offs made on its applicable financial statement that occur in taxable years ending on or after December 28, 2023, and before the date of publication of final regulations in the **Federal Register**.

Special Analyses

I. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

These proposed regulations do not impose any additional information collection requirements in the form of reporting, recordkeeping requirements, or third-party disclosure statements. The Allowance Charge-off Method is a method of accounting under the proposed regulations, and therefore taxpayers would be required to request the consent of the Commissioner for a change in method of accounting under section 446(e) to change to that method. The IRS expects that these taxpayers would request this consent by filing Form 3115, *Application for Change in Accounting Method.* Filing of Form 3115 and any statements attached thereto is the sole collection of information requirement imposed by the statute and the proposed regulations.

For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(c)) (PRA), the reporting burden associated with the collection of information for the Form 3115 will be reflected in the PRA submission associated with the income tax returns under the OMB control number 1545–0123. To the extent there is a change in burden because of these proposed regulations, the change in burden will be reflected in the updated burden estimates for Form 3115. The requirement to maintain records to substantiate information on Form 3115 is already contained in the burden associated with the control number for the form and remains unchanged.

The proposed regulations also would remove the requirement in § 1.166–2(d)(3)(iii)(B) for a new bank to attach a statement to its income tax return, and thereby reduce the burden estimates for OMB control number 1545–0123. The overall burden estimates associated with the OMB control number are aggregate amounts related to the entire package of forms associated with the applicable OMB control number and will include, but not isolate, the estimated burden of the tax forms that will be created, revised, or reduced as a result of the information collection in these proposed regulations. These numbers are therefore not specific to the burden imposed by these proposed regulations. No burden estimates specific to the forms affected by the proposed regulations are currently available. For the OMB control number discussed in this section, the Treasury Department and the IRS estimate PRA burdens on a taxpayer-type basis rather than a provision-specific basis. Those estimates capture both changes made by the proposed regulations (when final) and other regulations that affect the compliance burden for that form.

The Treasury Department and IRS request comment on all aspects of the information collection burden related to the proposed regulations, including estimates for how much time it would take to comply with the paperwork burden described above for the relevant form and ways for the IRS to minimize paperwork burden. In addition, when available, drafts of IRS forms are posted at *https://www.irs.gov/draft-tax-forms,* and comments may be submitted at *https://www.irs.gov/forms-pubs/comment-on-tax-forms-and-publications.* Final IRS forms are available at *https://www.irs.gov/forms-instructions.* Forms will not be finalized until after they have been approved by OMB under the PRA.

III. Regulatory Flexibility Act

It is hereby certified that these regulations would not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

These proposed regulations would affect only those business entities that qualify as regulated financial companies and members of regulated financial groups, as defined in the proposed regulations. These entities are expected to consist of insurance companies and financial institutions with annual receipts in excess of the amounts set forth in 13 CFR 121.201, Sector 52 (finance and insurance). Therefore, these proposed regulations will not affect a substantial number of small entities.

Although the burden falls primarily on larger entities, some small entities with annual receipts not in excess of the amounts set forth in 13 CFR 121.201, Sector 52 (finance and insurance), may be affected. However, these proposed regulations are unlikely to present a significant economic burden on any small entities affected. The costs to comply with these proposed regulations are not significant. Taxpayers needing to make method changes pursuant to the proposed regulations would be required to file a Form 3115. For those entities that would make a method change, the cost to determine or track the information needed is minimal. The insurance companies and financial institutions affected by the proposed regulations prepare financial statements in accordance with SSAPs or GAAP. The Allowance Charge-off Method is a method of accounting under which these entities would be permitted to use these financial statements to obtain a

conclusive presumption of worthlessness for purposes of claiming bad debt deductions under section 166. Accordingly, the affected entities already possess the information needed. The cost in time to fill out a Form 3115 would be minimal.

Notwithstanding this certification, the Treasury Department and IRS invite comments from the public about the impact of these proposed regulations on small entities.

Pursuant to section 7805(f), these regulations will be submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on their impact on small business.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This proposed rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector, in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These proposed regulations do not have federalism implications and do not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

Comments and Requests for a Public Hearing

Before these proposed amendments to the final regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed regulations, including how best to transition from the existing regulations to the proposed regulations. Any comments submitted will be made available at *https://www.regulations.gov* or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Stephanie D. Floyd and Jason D. Kristall of the Office of Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the Treasury Department and the IRS participated in their development.

Statement of Availability of IRS Documents

The IRS Notices, Revenue Procedures, and Revenue Rulings cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.166–2 is amended by revising paragraph (d) to read as follows:

§ 1.166–2 Evidence of worthlessness.

* * * * *

(d) *Regulated financial companies and members of regulated financial groups*— (1) *Worthlessness presumed in year of charge-off.* Debt held by a regulated financial company (as defined in paragraph (d)(4)(ii) of this section) or a member of a regulated financial group (as defined in paragraph (d)(4)(iii) of this section) that uses the charge-off method described in paragraph (d)(1) of this section (Allowance Charge-off Method) is conclusively presumed to have become worthless, in whole or in part, to the extent that the amount of any charge-off (as defined in paragraph (d)(4)(i) of this section) under paragraph (d)(1)(i) or (ii) of this section is claimed as a deduction under section 166 of the Internal Revenue Code (Code) by the regulated financial company or the member of a regulated financial group on the relevant Federal income tax return for the taxable year in which the charge-off takes place.

(i) *Allowance Charge-off Method generally.* The debt is charged off from the allowance for credit losses in accordance with the United States Generally Accepted Accounting Principles and recorded in the period in which the debt is deemed uncollectible on the applicable financial statement (as defined in paragraph (d)(4)(viii) of this section) of the regulated financial company or the member of a regulated financial group.

(ii) *Certain regulated insurance companies.* In the case of a regulated financial company that is a regulated insurance company (as defined in paragraph (d)(4)(vii) of this section) that prepares an applicable financial statement pursuant to paragraphs (d)(4)(viii) and (d)(4)(ix)(D) of this section, the debt is charged off pursuant to an accounting entry or set of accounting entries that reduce the debt's carrying value and result in a realized loss or a charge to the statement of operations (as opposed to recognition of an unrealized loss) that, in either case, is recorded on the regulated insurance company's annual statement.

(2) *Methods of accounting*—(i) *In general.* A taxpayer may change a method of accounting only with the consent of the Commissioner as required under section 446(e) of the Code and the corresponding regulations. A change to the Allowance Charge-off Method under this paragraph (d) constitutes a change in method of accounting. Accordingly, a regulated financial company or member of a regulated financial group that changes its method of accounting to the Allowance Charge-Off Method is required to secure consent of the Commissioner before using this method for Federal income tax purposes. A change to the Allowance Charge-off Method must be made on an entity-by-entity basis.

(ii) *General rule for changes in method of accounting.* A taxpayer that makes a change in method of accounting to the Allowance Charge-Off Method is treated as making a change in method initiated by the taxpayer for purposes of section 481 of the Code. A taxpayer obtains the consent of the Commissioner to make a change in method of

accounting by using the applicable administrative procedures that govern changes in method of accounting under section 446(e). *See* § 1.446–1(e)(3).

(3) *Worthlessness in later taxable year.* If a regulated financial company or member of a regulated financial group does not claim a deduction under section 166 for a totally or partially worthless debt on its Federal income tax return for the taxable year in which the charge-off takes place, but claims the deduction for a later taxable year, then the charge-off in the prior taxable year is deemed to have been involuntary and the deduction under section 166 is allowed for the taxable year for which claimed.

(4) *Definitions.* The following definitions apply for purposes of paragraph (d) of this section:

(i) *Charge-off.* The term *charge-off* means an accounting entry or set of accounting entries for a taxable year that reduces the basis of the debt when the debt is recorded in whole or in part as a loss asset on the applicable financial statement (as defined in paragraph (d)(4)(viii) of this section) of the regulated financial company or the member of a regulated financial group for that year. For a regulated financial company that is a regulated insurance company (as defined in paragraph (d)(4)(vii) of this section) that has as its applicable financial statement a financial statement described in paragraph (d)(4)(ix)(D) of this section, the term *charge-off* means an accounting entry or set of accounting entries that reduce the debt's carrying value and results in a realized loss or a charge to the statement of operations (as opposed to recognition of unrealized loss) that is recorded on the regulated insurance company's annual statement.

(ii) *Regulated financial company.* The term *regulated financial company* means—

(A) A bank holding company, as defined in 12 U.S.C. 1841, that is a domestic corporation;

(B) A covered savings and loan holding company, as defined in 12 CFR 217.2;

(C) A national bank;

(D) A bank that is a member of the Federal Reserve System and is incorporated by special law of any State, or organized under the general laws of any State, or of the United States, or other incorporated banking institution engaged in a similar business;

(E) An insured depository institution, as defined in 12 U.S.C. 1813(c)(2);

(F) A U.S. intermediate holding company formed by a foreign banking organization in compliance with 12 CFR 252.153;

(G) An Edge Act corporation organized under section 25A of the Federal Reserve Act (12 U.S.C. 611–631);

(H) A corporation having an agreement or undertaking with the Board of Governors of the Federal Reserve System under section 25 of the Federal Reserve Act (12 U.S.C. 601–604a);

(I) A Federal Home Loan Bank, as defined in 12 U.S.C. 1422(1)(A);

(J) A Farm Credit System Institution chartered and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*);

(K) A regulated insurance company, as defined in paragraph (d)(4)(vii) of this section;

(L) The Federal National Mortgage Association;

(M) The Federal Home Loan Mortgage Corporation; and

(N) Any additional entities that may be provided in guidance published in the Internal Revenue Bulletin (*see* § 601.601(d)(2)(ii)(a) of this chapter).

(iii) *Regulated financial group.* The term *regulated financial group* means one or more chains of corporations connected through stock ownership with a common parent corporation that is not described in section 1504(b)(4) of the Code and is a regulated financial company described in paragraphs (d)(4)(ii)(A) through (N) of this section (regulated financial group parent) that is not owned, directly or indirectly (as set out in paragraph (d)(4)(v) of this section), by another regulated financial company, but only if—

(A) The regulated financial group parent owns directly or indirectly stock meeting the requirements of section 1504(a)(2) in at least one of the other corporations; and

(B) Stock meeting the requirements of section 1504(a)(2) in each of the other corporations (except the regulated financial group parent) is owned directly or indirectly by one or more of the other corporations.

(iv) *Stock.* The term *stock* has the same meaning as stock in section 1504 (without regard to § 1.1504–4), and all shares of stock within a single class are considered to have the same value. Thus, control premiums and minority and blockage discounts within a single class are not taken into account.

(v) *Indirect stock ownership.* Indirect stock ownership is determined by applying the constructive ownership rules of section 318(a) of the Code.

(vi) *Member of a regulated financial group.* A member of a regulated financial group is any corporation in the chain of corporations of a regulated financial group described in paragraph (d)(4)(iii) of this section. A corporation, however, is not a member of a regulated financial group if it is held by a regulated financial company pursuant to 12 U.S.C. 1843(k)(1)(B), 12 U.S.C. 1843(k)(4)(H), or 12 U.S.C. 1843(o), or if it is a Regulated Investment Company under section 851 of the Code, or a Real Estate Investment Trust under section 856 of the Code.

(vii) *Regulated insurance company.* The term *regulated insurance company* means a corporation that is—

(A) Subject to tax under subchapter L of chapter 1 of the Code;

(B) Domiciled or organized under the laws of one of the 50 States or the District of Columbia (State);

(C) Licensed, authorized, or regulated by one or more States to sell insurance, reinsurance, or annuity contracts to persons other than related persons (within the meaning of section 954(d)(3) of the Code) in such States, but in no case will a corporation satisfy the requirements of this paragraph (d)(4)(vii)(C) if a principal purpose for obtaining such license, authorization, or regulation was to qualify the issuer as a regulated insurance company; and

(D) Engaged in regular issuances of (or subject to ongoing liability with respect to) insurance, reinsurance, or annuity contracts with persons that are not related persons (within the meaning of section 954(d)(3)).

(viii) *Applicable financial statement.* The term *applicable financial statement* means a financial statement that is described in paragraph (d)(4)(ix) of this section of a regulated financial company or any member of a regulated financial group. The financial statement may be a separate company financial statement of any member of a regulated financial group, if prepared in the ordinary course of business; otherwise, it is the consolidated financial statement that includes the assets, portion of the assets, or annual total revenue of any member of a regulated financial group.

(ix) *Financial statement.* The term *financial statement* means the taxpayer's financial statement listed in paragraphs (d)(4)(ix)(A) through (D) of this section that has the highest priority. A financial statement includes any supplement or amendment to that financial statement. The financial statements are, in order of descending priority:

(A) A financial statement certified as being prepared in accordance with Generally Accepted Accounting Principles that is a Form 10–K (or successor form), or annual statement to shareholders, required to be filed with the United States Securities and Exchange Commission;

(B) A financial statement that is required to be provided to a bank regulator;

(C) In the case of an insurance company, a financial statement based on Generally Accepted Accounting Principles that is given to creditors for purposes of making lending decisions, given to equity holders for purposes of evaluating their investments in the regulated financial company or member of a regulated financial group, or provided for other substantial non-tax purposes, and that the regulated financial company or member of a regulated financial group reasonably anticipates will be directly relied on for the purposes for which it was given or provided and that is prepared contemporaneously with a financial statement prepared in accordance with the standards set out by the National Association of Insurance Commissioners and filed with the insurance regulatory authorities of a State that is the principal insurance regulator of the insurance company; and

(D) In the case of an insurance company, a financial statement that is prepared in accordance with the standards set out by the National Association of Insurance Commissioners and filed with the insurance regulatory authorities of a State that is the principal insurance regulator of the insurance company.

(x) *Bank regulator.* The term *bank regulator* means the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System and any Federal Reserve Bank, the Federal Deposit Insurance Corporation, the Farm Credit Administration, the Federal Housing Finance Authority, any successor to any of the foregoing entities, or State banking authorities maintaining substantially equivalent standards as these Federal regulatory authorities. Additional entities included in this paragraph (d)(4)(x) may be provided in guidance published in the Internal Revenue Bulletin (*see* § 601.601(d)(2)(ii)(a) of this chapter).

(5) *Applicability date.* Paragraph (d) of this section applies to charge-offs made by a regulated financial company or a member of a regulated financial group on its applicable financial statement that occur in taxable years ending on or after [DATE OF FINAL RULE]. A regulated financial company or a member of a regulated financial group may choose to apply paragraph (d) of this section to charge-offs on its applicable financial statement that occur in taxable years ending on or after December 28, 2023.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2023–28589 Filed 12–27–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[USCG–2023–0749]

RIN 1625–AA01

Establish Anchorage Ground; Port Westward Anchorage, Columbia River, Oregon and Washington

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is considering establishing an anchorage ground near Port Westward, Oregon in the Columbia River. We are considering this action after receiving requests suggesting that this anchorage ground is necessary to provide for the safe anchoring of commercial vessels in the navigable waters of the Lower Columbia River. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before February 26, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0749 using the Federal Decision-Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email LT Carlie Gilligan, Sector Columbia River Waterways Management Division, U.S. Coast Guard, 503–240–9319, email *SCRWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

Under Title 33 of the Code of Federal Regulations (CFR) 109.05, U.S. Coast Guard District Commanders are delegated the authority to establish anchorage grounds by the Commandant of the U.S. Coast Guard. The Coast Guard establishes anchorage grounds under Section 7 of the Act of March 4, 1915, as amended (38 Stat. 1053; 46 U.S.C. 70006) and places these regulations in Title 33 CFR part 110, subpart B. The Coast Guard is proposing the rulemaking to establish a Port Westward anchorage ground in the Columbia River.

In the last several years, the Columbia River Marine Transportation System has seen an increase in commercial traffic and vessel size, thus creating a concern for anchorage capacity within the river system. The Columbia River Steamship Operators Association and the Columbia River Pilots have formally requested the Coast Guard review and evaluate the establishment of this new anchorage ground to address the safety and navigation concerns with the expanding vessel traffic in the Lower Columbia River.

The purpose of this rulemaking is to establish a Federal anchorage ground in the Lower Columbia River that would be maintained and used by commercial vessels. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The Coast Guard is proposing to establish a new anchorage ground in the vicinity of Port Westward, in the Lower Columbia River. The anticipated users of the proposed anchorage ground are commercial vessels and their attending tug, tow, or push boats. The approximate depth of this proposed anchorage ground would be 43 feet to align with the Federal channel depth and would accommodate a variety of vessel types and configurations. An illustration showing the location of the proposed anchorage ground is available in the docket.

When the Columbia River Federal channel was deepened in 2010, the size and draft of commercial vessels was increased, but the anchorage capacity within the river system was not. The vessels transiting in the Columbia River system now are longer and have deeper drafts than before the channel was deepened. Having larger vessels, and increased transit frequency causes concern for safe navigation and emergency situations with limited anchorage capacity. The proposed Port

Westward anchorage ground would double the anchorage capacity in Longview, WA, for larger vessels, and allow the pilots to spread out distances between ships during storms or high wind events. The increased anchorage capacity in the Columbia River would also alleviate concern for anchorage availability for vessels experiencing emergencies or needing a harbor of safe refuge. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the location and size of the proposed anchorage ground, as well as the vessel traffic and anchoring data provided by the Coast Guard Navigation Center. The regulation would ensure approximately 0.336 square miles of anchorage grounds are designated to provide necessary commercial deep draft anchorages and enhance the navigational safety of commercial vessels transiting to, from, and within the Columbia River. The impact on routine navigation is expected to be minimal because the proposed anchorage ground is located outside the Federal channel and is consistent with current anchorage habits. When not occupied, vessels would be able to maneuver in, around, and through the anchorages.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to use the anchorage ground may be mall entities, for reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves establishing an anchorage ground, Port Westward Anchorage, in an area traditionally used by commercial ships for anchoring in the Lower Columbia River system; and increasing the anchorage capacity of the river system. Normally such actions are categorically excluded from further review under paragraph L59(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you

submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0749 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the proposed rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 110

Anchorage grounds.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

■ 1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 2071; 46 U.S.C. 70006, 70034; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 110.228 (a)(14) to subpart B to read as follows:

§ 110.228 Columbia River, Oregon and Washington.

(a) * * *

(14) *Port Westward Anchorage.* All waters in the vicinity of Port Westward, Oregon, bound by a line connecting the following points:

Latitude	Longitude
46°10′16.80″	123°12′58.80″
46°10′48.60″	123°11′25.20″
46°10′43.20″	123°11′21.60″
46°09′59.40″	123°12′46.80″

Dated: December 21, 2023.

Charles E. Fosse,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

[FR Doc. 2023–28652 Filed 12–27–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[USCG–2023–0485]

RIN 1625–AA01

Establish Anchorage Ground; Rice Island Anchorage, Columbia River, Oregon and Washington

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is considering establishing an anchorage ground near Rice Island, Oregon in the Columbia River. We are considering this action after receiving requests suggesting that this anchorage ground is necessary to provide for the safe anchoring of commercial vessels in the navigable waters of the Lower Columbia River. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before February 26, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0485 using the Federal Decision-Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email LT Carlie Gilligan, Sector Columbia River Waterways Management Division, U.S. Coast Guard, 503–240–9319, email *SCRWWM@uscg.mil.*

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In the last several years, the Columbia River Marine Transportation System has seen an increase in commercial traffic and vessel size, thus creating a concern for anchorage capacity within the river system. The Columbia River Steamship Operators Association and the Columbia River Pilots have formally requested the Coast Guard review and evaluate the establishment of this new anchorage ground to address the safety and navigation concerns with the expanding vessel traffic in the Lower Columbia River.

The purpose of this rulemaking is to establish a Federal anchorage ground in the Lower Columbia River that will be maintained and used by commercial vessels. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The Coast Guard is proposing to establish a new anchorage ground in the vicinity of Rice Island, in the Lower Columbia River. The anticipated users of the proposed anchorage ground are commercial vessels and their attending tug, tow, or push boats. The approximate depth of this proposed anchorage ground would be 43 feet to align with the federal channel depth and would accommodate a variety of vessel types and configurations. An illustration showing the location of the

proposed anchorage ground is available in the docket.

When the Columbia River Federal channel was deepened in 2010, the size and draft of commercial vessels was increased, but the anchorage capacity within the river system was not. The vessels transiting in the Columbia River system now are longer and have a deeper draft than before the channel was deepened. Having larger vessels and increased transit frequency causes concern for safe navigation and emergency situations with limited anchorage capacity. The proposed Rice Island anchorage ground would double the anchorage capacity in Astoria, OR, for larger vessels, and allow the pilots to spread out distances between ships during storms or high wind events. The increased anchorage capacity in the Columbia River would also alleviate concern for anchorage availability for vessels experiencing emergencies or needing a harbor of safe refuge. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the location and size of the proposed anchorage ground, as well as the vessel traffic and anchoring data provided by the Coast Guard Navigation Center. The regulation would ensure approximately 1.745 square miles of anchorage grounds are designated to provide necessary commercial deep draft anchorages and enhance the navigational safety of commercial vessels transiting to, from, and within the Columbia River. The impact on routine navigation is expected to be minimal because the proposed anchorage ground is located outside the federal channel and is consistent with current anchorage habits. When not occupied, vessels would be able to maneuver in, around, and through the anchorages.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to use the anchorage ground may be small entities, for reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves establishing an anchorage ground, Rice Island Anchorage, in an area traditionally used by commercial ships for anchoring in the Lower Columbia River system; and increasing the anchorage capacity of the river system. Normally such actions are categorically excluded from further review under paragraph L59(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket,

see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0485 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the proposed rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR part 110

Anchorage grounds.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

■ 1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 2071; 46 U.S.C. 70006, 70034; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 110.228 (a)(12) to subpart B to read as follows:

§ 110.228 Columbia River, Oregon and Washington.

(a) * * *

(12) *Rice Island Anchorage.* All waters in the vicinity of Rice Island, Oregon, bound by a line connecting the following points:

Latitude	Longitude
46°13′15.60″	123°46′28.20″
46°13′37.20″	123°45′22.20″
46°14′42.00″	123°43′12.00″
46°14′52.80″	123°42′12.00″
46°14′42.60″	123°42′00.00″
46°13′47.40″	123°43′48.60″
46°13′36.60″	123°44′15.60″
46°13′07.20″	123°45′58.20″
46°13′00.60″	123°46′16.80″

Dated: December 21, 2023.

Charles E. Fosse,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

[FR Doc. 2023–28656 Filed 12–27–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[USCG–2023–0750]

RIN 1625–AA01

Establish Anchorage Ground; Crims Island Anchorage, Columbia River, Oregon and Washington

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is considering establishing an anchorage ground near Crims Island, Oregon in the Columbia River. We are considering this action after receiving requests suggesting that this anchorage ground is necessary to provide for the safe anchoring of commercial vessels in the navigable waters of the Lower Columbia River. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before February 26, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0750 using the Federal Decision-Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email LT Carlie Gilligan, Sector Columbia River Waterways Management Division, U.S. Coast Guard, 503–240–9319, email *SCRWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

Under Title 33 of the Code of Federal Regulations (CFR) 109.05, U.S. Coast Guard District Commanders are delegated the authority to establish anchorage grounds by the Commandant of the U.S. Coast Guard. The Coast Guard establishes anchorage grounds under Section 7 of the Act of March 4, 1915, as amended (38 Stat. 1053; 46 U.S.C. 70006) and places these regulations in Title 33 CFR part 110, subpart B. The Coast Guard is proposing the rulemaking to establish a Crims Island anchorage ground in the Columbia River.

In the last several years, the Columbia River Marine Transportation System has seen an increase in commercial traffic and vessel size, thus creating a concern for anchorage capacity within the river system. The Columbia River Steamship Operators Association and the Columbia River Pilots have formally requested the Coast Guard review and evaluate the establishment of this new anchorage ground to address the safety and navigation concerns with the expanding vessel traffic in the Lower Columbia River.

The purpose of this rulemaking is to establish a Federal anchorage ground in

the Lower Columbia River that would be maintained and used by commercial vessels. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The Coast Guard is proposing to establish a new anchorage ground in the vicinity of Crims Island in the Lower Columbia River. The anticipated users of the proposed anchorage ground are commercial vessels and their attending tug, tow, or push boats. The approximate depth of this proposed anchorage ground would be 43 feet to align with the Federal channel depth and would accommodate a variety of vessel types and configurations. An illustration showing the location of the proposed anchorage ground is available in the docket.

When the Columbia River Federal channel was deepened in 2010, the size and draft of commercial vessels was increased, but the anchorage capacity within the river system was not. The vessels transiting in the Columbia River system now are longer and have deeper drafts than before the channel was deepened. Having larger vessels, and increased transit frequency causes concern for safe navigation and emergency situations with limited anchorage capacity. The proposed Crims Island anchorage ground would double the anchorage capacity in Longview, WA, for larger vessels, and allow the pilots to spread out distances between ships during storms or high wind events. The increased anchorage capacity in the Columbia River would also alleviate concern for anchorage availability for vessels experiencing emergencies or needing a harbor of safe refuge. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the location and size of the proposed anchorage ground, as well as the vessel traffic and anchoring data provided by the Coast Guard Navigation Center. The regulation would ensure approximately 0.633 square miles of anchorage grounds are designated to provide necessary commercial deep draft anchorages and enhance the navigational safety of commercial vessels transiting to, from, and within the Columbia River. The impact on routine navigation is expected to be minimal because the proposed anchorage ground is located outside the Federal channel and is consistent with current anchorage habits. When not occupied, vessels would be able to maneuver in, around, and through the anchorages.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to use the anchorage ground may be small entities, for reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal Government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy

Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves establishing an anchorage ground, Crims Island Anchorage, in an area traditionally used by commercial ships for anchoring in the Lower Columbia River system; and increasing the anchorage capacity of the river system. Normally such actions are categorically excluded from further review under paragraph L59(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0750 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the proposed rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 110

Anchorage grounds.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 110 as follows:

PART 110—ANCHORAGE REGULATIONS

■ 1. The authority citation for part 110 continues to read as follows:

Authority: 33 U.S.C. 2071; 46 U.S.C. 70006, 70034; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 110.228(a)(13) to subpart B to read as follows:

§ 110.228 Columbia River, Oregon and Washington.

(a) * * *

(13) *Crims Island Anchorage.* All waters in the vicinity of Crims Island, Oregon, bound by a line connecting the following points:

Latitude	Longitude
46°10′48.00″	123°06′41.40″
46°09′37.20″	123°04′31.20″
46°09′24.60″	123°03′43.20″
46°09′19.20″	123°03′46.20″
46°09′31.80″	123°04′35.40″
46°10′32.40″	123°06′59.40″

Dated: December 21, 2023.

Charles E. Fosse,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

[FR Doc. 2023–28654 Filed 12–27–23; 8:45 am]

BILLING CODE 9110–04–P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 300–3, 301–11, 301–50, 301–52, 301–70, 301–71 and 301–73

[FTR Case 2023–03; Docket No. GSA–FTR–2023–0023, Sequence No. 1]

RIN 3090–AK66

Federal Travel Regulation; Updating Glossary of Terms and E-Gov Travel Service Requirements

AGENCY: Office of Government-wide Policy (OGP), General Services Administration (GSA).

ACTION: Proposed rule.

SUMMARY: GSA is proposing to amend the Federal Travel Regulation (FTR) Glossary of Terms to add the term ''*Online booking tool (OBT)*'' and revise the definition of ''*E-Gov Travel Service (ETS)*''*;* remove outdated policies on implementing ETS; renumber ETS regulations in a sequential order as necessary; and make miscellaneous editorial corrections.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before February 26, 2024 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FTR case 2023–03 to *Regulations.gov* at *https://www.regulations.gov* via the Federal eRulemaking portal by searching for ''FTR Case 2023–03''. Select the link ''Comment Now'' that corresponds with FTR Case 2023–03. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FTR Case 2023–03'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite FTR Case 2023–03, in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Cheryl D. McClain-Barnes, Program Analyst, Office of Government-wide Policy, at 202–208–4334 or *travelpolicy@gsa.gov* for clarification of

content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FTR Case 2023–03.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with 5 U.S.C. 5707, the Administrator of General Services is authorized to prescribe regulations regarding reimbursement for Federal employees traveling on official business away from their official duty stations. The overall implementing authority is the FTR, codified in title 41 of the Code of Federal Regulations, chapters 300 through 304.

In November 2003, GSA's Federal Acquisition Service awarded master contracts for the first iteration of ETS, a web-based end-to-end travel management service. GSA published FTR Amendment 2003–07 (68 FR 71026) in December 2003, to amend the FTR on the required use of the new travel service. The original ETS implementation policies included timelines with specific dates for agencies to deploy ETS and migrate to the new platform. This information regarding ETS implementation is no longer needed because all mandatory users have deployed ETS (either initially, or upon expiration of an exception to its use) since it became available to civilian agencies in the first quarter of 2004.

Contracts awarded under ETS2, the second iteration of ETS, are set to expire in June 2027. As GSA focuses on procuring and implementing the third iteration of ETS, known as ''E-Gov Travel Service, Next Generation'' or ''ETSNext'' for short, GSA proposes to revise FTR Parts 301–11, 301–50, 301–52, 301–70, 301–71 and 301–73 to remove the original ETS implementation policies that are no longer applicable.

Specifically, GSA proposes to relocate a definitional term at § 301–50.6, namely ''online self-service booking tool,'' to part 300–3 ''Glossary of Terms,'' update the definition, rename that term ''online booking tool (OBT),'' and renumber part 301–50 in logical order. GSA proposes to further update the ''Glossary of Terms'' to make an update and an editorial change to the definition of ''*E-Gov Travel Service (ETS)*'' by capitalizing the acronym ''ETS'' in the body of the definition to be consistent with the definition heading.

GSA also proposes to remove and reserve § 301–73.101 and relocate relevant language from ''Note 1'' of the section regarding agency funding responsibility for ETS to a note to § 301–73.2. GSA further proposes to revise the note to § 301–73.106 to remove duplicate language and text regarding travel agent services that align with present requirements for ETS2, but may not align with the terms of successor travel management service contract(s). Finally, GSA proposes to add a reference to the ''extenuating circumstances'' exception to the use of ETS and Travel Management Service (TMS) to existing exceptions at §§ 301–50.4 and 301–73.102.

II. Executive Orders 12866, 13563, and 14094

Executive Order (E.O.) 12866 (*Regulatory Planning and Review*) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 (*Improving Regulation and Regulatory Review*) emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 14094 (*Modernizing Regulatory Review*) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in E.O. 12866 and E.O. 13563. The Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA) has determined this rulemaking is not a significant regulatory action and, therefore, is not subject to review under section 6(b) of E.O. 12866.

III. Regulatory Flexibility Act

GSA does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This proposed rule is also exempt from Administrative Procedure Act pursuant to 5 U.S.C. 553(a)(2) because it applies to agency management or personnel. Therefore, an Initial Regulatory Flexibility Analysis has not been performed.

IV. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FTR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 41 CFR Parts 300–3, 301–11, 301–50, 301–52, 301–70, 301–71 and 301–73

Administrative practice and procedure, Government contracts, Government employees, Individuals with disabilities, Travel and transportation expenses.

Krystal J. Brumfield,

Associate Administrator, Office of Government-wide Policy.

Therefore, GSA proposes to amend 41 CFR parts 300–3, 301–11, 301–50, 301–52, 301–70, 301–71 and 301–73 as set forth below:

PART 300–3—GLOSSARY OF TERMS

■ 1. The authority citation for 41 CFR part 300–3 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); 49 U.S.C. 40118; 5 U.S.C. 5738; 5 U.S.C. 5741–5742; 20 U.S.C. 905(a); 31 U.S.C. 1353; E.O 11609, as amended, 3 CFR, 1971–1975 Comp., p. 586, Office of Management and Budget Circular No. A–126, Revised May 22, 1992.

■ 2. Amend § 300–3.1 by:

■ a. Revising the definition of ''E-Gov Travel Service (ETS)''; and

■ b. Adding in alphabetical order the definition, ''Online booking tool (OBT)''.

The revision and addition read as follows:

§ 300–3.1 What do the following terms mean?

* * * * *

E-Gov Travel Service (ETS)—The Government-contracted, end-to-end travel management service that automates and consolidates the Federal travel process in a self-service environment, covering all aspects of official travel, including travel planning, authorization, reservations, ticketing, expense reimbursement, and travel management reporting. The ETS provides the services of a Federal travel management program as specified in § 301–73.1(a), (b), and (e) of this title.

* * * * *

Online booking tool (OBT)—An internet-based system that permits travelers to make reservations for transportation (*e.g.,* air, rail, and car rental) and lodging. ETS and agency Travel Management Service providers incorporate an OBT.

* * * * *

PART 301–11—PER DIEM EXPENSES

■ 3. The authority citation for 41 CFR part 301–11 continues to read as follows:

Authority: 5 U.S.C. 5707.

■ 4. Amend § 301–11.25 by revising the Note to § 301–11.25 to read as follows:

§ 301–11.25 Must I provide receipts to substantiate my claimed travel expenses?

* * * * *

Note 1 to § 301–11.25: Hard copy receipts should be electronically scanned and submitted with your electronic travel claim.

PART 301–50—ARRANGING FOR TRAVEL SERVICES

■ 5. The authority citation for part 301–50 continues to read as follows:

Authority : 5 U.S.C. 5707; 40 U.S.C. 121(c).

■ 6. Revise § 301–50.3 to read as follows:

§ 301–50.3 Must I use the ETS or TMS to arrange my travel?

Yes, if you are an employee of an agency as defined in § 301–1.1 of this chapter, you must use the ETS, or your agency's TMS (if an exception to ETS use is granted), to make your travel arrangements. If you are an employee of the Department of Defense, the legislative branch, or the Government of the District of Columbia, you must arrange your travel in accordance with your agency's TMS. Your agency may grant, or be granted, an exception to required use of TMS or ETS under §§ 301–50.4, 301–73.102, or 301–73.104 of this chapter.

■ 7. Revise § 301–50.4 to read as follows:

§ 301–50.4 May I be granted an exception to the required use of TMS or ETS?

Yes, your agency head or their designee may grant an individual case exception to required use of your agency's TMS or to required use of ETS, but only when your travel meets one of the following conditions:

(a) Such use would result in an unreasonable burden on mission accomplishment (*e.g.,* emergency travel is involved and TMS or ETS is not accessible; you are performing invitational travel; or you have special needs or require disability accommodations under part 301–13 of this chapter).

(b) Such use would compromise a national security interest.

(c) Such use might endanger your life (*e.g.,* you are traveling under the Federal witness protection program, or you are a threatened law enforcement or investigative officer traveling under part 301–31 of this chapter).

(d) Such use is prevented due to extenuating circumstances (see § 301–50.6).

§ 301–50.5 [Amended]

■ 8. Amend § 301–50.5 by:

■ a. Removing from the section heading the words ''TMS or the E-Gov Travel Service'' and adding in their place ''TMS or ETS'';

■ b. Removing the citations ''§ 301–50.4 or § 301–73.104'' and adding ''§§ 301–50.4, 301–73.102, or 301–73.104'' in their place; and

■ c. Removing the words ''E-Gov Travel Service'' and adding in their place ''ETS''.

§ 301–50.6 [Removed]

■ 9. Remove section § 301–50.6.

§ 301–50.7 [Redesignated as § 301–50.6 and Amended]

■ 10. Amend § 301–50.7 by redesignating § 301–50.7 as § 301–50.6 and revising newly redesignated § 301–50.6 to read as follows:

§ 301–50.6 Am I required to use the OBT offered by ETS?

Yes, you are required to use the OBT offered by ETS, or your agency's TMS (if an exception to ETS use is granted), unless extenuating circumstances prevent such use. Some extenuating circumstances for which you may not be able to use an OBT are:

(a) When you are attending a conference where the conference sponsor has negotiated with one or more lodging facilities to set aside a specific number of rooms for conference attendees and to ensure that a set aside room is available to you, you are required to book lodging directly with the lodging facility;

(b) When your travel is to a remote location and it is not possible to book lodging accommodations through the TMS or ETS; or

(c) When such travel arrangements are so complex and circumstances will not allow you to book your travel through an OBT.

PART 301–52—CLAIMING REIMBURSEMENT

■ 11. The authority citation for 41 CFR part 301–52 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); Sec. 2., Pub. L. 105–264, 112 Stat. 2350 (5 U.S.C. 5701 note).

■ 12. Revise § 301–52.3 to read as follows:

§ 301–52.3 Am I required to file a travel claim (voucher) in a specific format, and must the claim be signed?

You must use the format prescribed by ETS to file all your travel claims unless your agency has been granted, or has granted you, an exception from required use of the ETS in accordance with §§ 301–50.4, 301–73.102, or 301–73.104 of this chapter. If the prescribed travel claim is hardcopy, the claim must be signed in ink. Any alterations or erasures to your hardcopy travel claim must be initialed. If your agency has electronic document processing, use your electronic signature where required.

PART 301–70—INTERNAL POLICY AND PROCEDURE REQUIREMENTS

■ 13. The authority citation for 41 CFR part 301–70 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); Sec. 2, Pub. L. 105–264, 112 Stat. 2350 (5 U.S.C. 5701, note); OMB Circular No. A–126, revised May 22, 1992; OMB Circular A–123, Appendix B, revised August 27, 2019.

■ 14. Amend § 301–70.1 by revising paragraph (d) to read as follows:

§ 301–70.1 How must we administer the authorization and payment of travel expenses?

* * * * *

(d) Must require employees to use the ETS to process travel authorizations and claims for travel expenses, unless an exception has been granted under §§ 301–50.4, 301–73.102, or 301–73.104 of this chapter.

PART 301–71—AGENCY TRAVEL ACCOUNTABILITY REQUIREMENTS

■ 15. The authority citation for 41 CFR part 301–71 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); Sec. 2, Pub. L. 105–264, 112 Stat. 2350 (5 U.S.C. 5701 note).

■ 16. Amend § 301–71.201 by revising the second sentence of the introductory text and paragraph (e) to read as follows:

§ 301–71.201 What are the reviewing official's responsibilities?

* * * The reviewing official must ensure:

* * * * *

(e) The required receipts, statements, justifications, etc., are attached to the travel claim and the electronic travel claim includes scanned electronic images of such documents.

PART 301–73—TRAVEL PROGRAMS

■ 17. The authority citation for 41 CFR part 301–73 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c).

■ 18. Amend § 301–73.1 by revising paragraph (e) to read as follows:

§ 301–73.1 What does the Federal travel management program include?

* * * * *

(e) A Travel Management Reporting System that covers financial and other travel characteristics required by the Agency Payments for Employee Travel, Transportation, and Relocation annual report (*see* §§ 300–70.1 through 300–70.4 of this title).

* * * * *

■ 19. Revise § 301–73.2 to read as follows:

§ 301–73.2 What are our responsibilities as participants in the Federal travel management program?

As a participant in the Federal travel management program, you must—

(a) Designate an authorized representative to administer the program;

(b) Ensure that you have internal policies and procedures in place to govern use of the program;

(c) Require employees in your agency to use ETS in lieu of TMS (unless an exception has been granted in accordance with §§ 301–50.4 of this chapter, 301–73.102, or 301–73.104); and

(d) Ensure that any agency-contracted TMS complements and supports ETS and data exchange in an efficient and cost effective manner.

Note 1 to § 301–73.2: Your agency is responsible for providing the funds and personnel resources required to support ETS transition and data exchange, and for establishing interfaces between the ETS standard data output and applicable business systems (*e.g.,* financial, human resources, etc.).

■ 20. Revise the heading of subpart B of part 301–73 to read as follows:

Subpart B—E-Gov Travel Service and Travel Management Service

■ 21. Revise § 301–73.100 to read as follows:

§ 301–73.100 Are agencies and their employees required to use the ETS?

Yes, unless you have an exception to the use of the ETS (*see* §§ 301–50.4 of this chapter, 301–73.102, and 301–73.104), agencies and employees must use the ETS for all temporary duty travel. The Department of Defense, the legislative branch, and the Government of the District of Columbia are not subject to this requirement.

§ 301–73.101 [Removed and Reserved]

■ 22. Remove and Reserve § 301–73.101.

■ 23. Revise § 301–73.102 to read as follows:

§ 301–73.102 May we grant a traveler an exception from required use of TMS or ETS?

(a) Yes, your agency head or their designee may grant an individual case by case exception to required use of your agency's TMS or to required use of ETS, but only when travel meets one of the following conditions:

(1) Such use would result in an unreasonable burden on mission accomplishment (*e.g.,* emergency travel is involved and TMS or ETS is not accessible; the traveler is performing invitational travel; or the traveler has special needs or requires disability accommodations in accordance with part 301–13 of this chapter).

(2) Such use would compromise a national security interest.

(3) Such use might endanger the traveler's life (*e.g.,* the individual is traveling under the Federal witness protection program, or is a threatened law enforcement or investigative officer traveling under part 301–31 of this chapter).

(4) Such use is prevented due to extenuating circumstances (see § 301–50.6 of this chapter).

(b) Any exception granted must be consistent with any contractual terms applicable to your TMS or ETS, and must not cause a breach of contract terms.

■ 24. Revise § 301–73.103 to read as follows:

§ 301–73.103 What must we do when we approve an exception to the use of the ETS?

The head of your agency or their designee must approve an exception to the use of the ETS under § 301–50.4 of this chapter or § 301–73.102 in writing or through electronic means.

■ 25. Amend § 301–73.104 by:

■ a. Removing from the section heading the words ''E-Gov Travel Service'' and adding in their place ''ETS''; and

■ b. Revising paragraphs (a) introductory text, (a)(1), (a)(2), (a)(4), (b), and (c).

The revisions read as follows:

§ 301–73.104 May further exceptions to the required use of the ETS be approved?

(a) The Administrator of General Services or their designee may grant an agency-wide exception (or exempt a component thereof) from the required use of ETS when requested by the head of a Department (cabinet-level agency) or head of an Independent agency when—

(1) The agency has presented a business case analysis to the General Services Administration that proves that it has an alternative TMS to the ETS that is in the best interest of the Government and the taxpayer (*i.e.,* the agency has evaluated the economic and service values offered by the ETS contractor(s) compared to those offered by the agency's current or proposed TMS and has determined that the agency's current or proposed TMS is a better value);

(2) The agency has security, secrecy, or protection of information issues that cannot be mitigated through security provided by the ETS contractor(s);

* * * * *

(4) The agency has critical and unique technology or business requirements that cannot be accommodated by the ETS contractor(s) at all or at an acceptable and reasonable price (*e.g.,* majority of travel is group-travel).

(b) As a condition of receiving an exception, the agency must agree to conduct annual business case reviews of its TMS and must provide to the ETS Program Management Office (PMO) data elements required by the ETS PMO in a format prescribed by the ETS PMO.

(c) Requests for exceptions should be addressed to the Administrator of General Services and sent to *travelpolicy@gsa.gov* with full justification and/or analysis addressing paragraphs (a)(1) through (4) of this section.

■ 26. Revise § 301–73.105 to read as follows:

§ 301–73.105 What are the consequences of an employee not using the ETS or TMS?

If an employee does not use the ETS (or your agency's designated TMS where an exception to ETS applies), the employee is responsible for any additional costs (see § 301–50.5 of this chapter) resulting from the failure to use the ETS or your TMS. In addition, you may take appropriate disciplinary actions.

■ 27. Amend § 301–73.106 by revising the Note to § 301–73.106 to read as follows:

§ 301–73.106 What are the basic services that should be covered by a TMS?

* * * * *

Note 1 to § 301–73.106: The ETS fulfills the basic services of a TMS.

[FR Doc. 2023–28551 Filed 12–27–23; 8:45 am]

BILLING CODE P

Notices

Federal Register
Vol. 88, No. 248
Thursday, December 28, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Collaborating, Learning, and Adapting Case Competition Submission Forms

AGENCY: U.S. Agency for International Development (USAID).

ACTION: Notice of information collection; request for comment.

SUMMARY: The Office of Learning, Evaluation, and Research holds an annual Collaborating, Learning, and Adapting (CLA) Case Competition, wherein USAID partners and staff can submit examples of the way in which they have employed CLA approaches in their work. The submissions are posted online (available to the public), contributing to agency learning through these real-world experiences. As required by the Paperwork Reduction Act of 1995, as amended, USAID is soliciting comments for this collection.

DATES: Comments are due February 26, 2024.

ADDRESSES: Comments submitted in response to this notice should be submitted to *amkoler@usaid.gov.*

FOR FURTHER INFORMATION CONTACT: Amy Koler, *amkoler@usaid.gov,* 202–257–0487.

SUPPLEMENTARY INFORMATION: USAID, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on the proposed survey.

Title of Collection: Collaborating, Learning, and Adapting Case Competition.

OMB Control Number: XXXXXX.

Type of Review: A new information collection.

Respondents/Affected Public: USAID partners and staff.

Total Estimated Number of Annual Responses: 85.

Total Estimated Number of Annual Burden Hours: 837.

Abstract: When a partner or USAID staff member decides to participate in the annual Collaborating, Learning, and Adapting (CLA) Case Competition, they must download the CLA Case Competition Submission Form from USAID's Learning Lab website. Through answering the six question form, they detail the context in which they were working, the specific manner in which they applied a CLA approach (or approaches) and describe the result of using that approach. The answers to these questions, plus a summary and a photo, constitute their submission to the competition. When they submit their case competition submission, they must also submit the CLA Case Competition Web Submission Form. This form captures additional information about the case, the organization submitting the form, and their experience with the case competition, as well as point of contact information. The CLA Case Competition Submission Form is shared with the public through USAID's Learning Lab website. The information from the CLA Case Competition Web Submission form is kept in a restricted online file.

USAID and the Office of Management and Budget are particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Tania Alfonso,

PLR/LER, Program Cycle Supervisory Team Lead, USAID.

[FR Doc. 2023–28658 Filed 12–27–23; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

[Docket No. USDA–2022–0010]

Agency Information Collection Activities; USDA Generic Solution for Solicitation for Funding Opportunity Announcement

ACTION: Notice; request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act, the U.S. Department of Agriculture (USDA) is requesting comments concerning authorization to revise the approved USDA Generic Solution for Solicitation for Funding Opportunity Announcement information collection request (ICR). This is a revision request. We are revising the ICR to cover the additional use across USDA agencies for grants, agreements, and other Federal financial assistance programs.

DATES: We will consider comments we receive by February 26, 2024.

ADDRESSES: We invite you to submit comments on this notice.

Electronic Submission of Comments. You may submit comments, identified by Docket ID: USDA–2022–0010, electronically through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions provided on that site to submit comments electronically.

Submission of Comments by Mail, Hand Delivery, or Courier. You may submit comments to the Office of Budget and Program Analysis, USDA, Jamie L. Whitten Building, Room 101–A, 1400 Independence Ave. SW, Washington, DC 20250. USDA strongly encourages commenters to submit comments electronically. Electronic submission of comments allows you maximum time to prepare and submit a comment and ensures timely receipt by USDA.

FOR FURTHER INFORMATION CONTACT: Steve O'Neill, 202–720–0038, *stephen.oneill@usda.gov.*

SUPPLEMENTARY INFORMATION: In compliance with the Paperwork Reduction Act (44 U.S.C. 3506(c)(2)(A)), USDA is requesting comments concerning a authorization to conduct the USDA Generic Solution for Solicitation for Funding Opportunity Announcement ICR. This is a revision request.

The U.S. Department of Agriculture (USDA) conducts a pre-clearance consultation program to provide the public and Federal agencies an opportunity to comment on proposed, revised, and continuing information collections before submitting them to the Office of Management and Budget (OMB).

This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

USDA is requesting an increase the approved burden hours to cover grant or cooperative agreement activity and funding announcements of new programs for other types of Federal financial assistance. USDA requests an increase in the responses by 880,000, and the burden hours by 1.5 million hours. USDA has successfully used the existing approval for ongoing information collection activities and is expecting to well beyond the initial estimates when the ICR was first approved by OMB. The increase has been for the Federal financial assistances for new programs.

Grants or Cooperative Agreement

Periodically USDA solicits grant applications on *http://grants.gov* by issuing a Funding Opportunity Announcement, Request for Applications, Notice of Funding Announcement, Notice of Solicitation of Applications, *Grants.gov* announcement, or other funding announcement type. To ensure grants are awarded to the applicant(s) best suited to perform the functions of the grant, applicants are generally required to submit an application. The first part of USDA grant applications consists of submitting the application form(s), which includes the Standard Form 424, Application for Federal Assistance and may include additional standard grant application forms. The second part of a grant application usually requires a technical proposal demonstrating the applicant's capabilities in accordance with a statement of work or selection criteria and other related information as specified in the funding announcement. Following the grant award, the grant awardee may also be required to provide progress reports or additional documents.

Federal Financial Assistance Programs

In addition to grants and agreements, there are other types of funding announcements. USDA agencies announce new Federal financial assistance programs in the **Federal Register** in a Notice of Funding Availability (NOFA) or other types of funding or program announcements. Generally, the applicants need to apply for financial assistance under the new program. The agencies generally require application forms and related forms for the applicants can apply for the Federal financial assistance.

A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid control number (see 5 CFR 1320.5(a) and 1320.6). USDA intends to seek approval from OMB for the revision request for this collection of information for 3 years.

Interested parties are encouraged to provide comments to the individual listed in the **ADDRESSES** section above.

Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. The comments will also become a matter of public record. Comments responsive to this request will be made available on-line, without redaction, as part of the submission to OMB; therefore, USDA is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

USDA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, USDA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Agency: USDA Office of the Secretary.

Type of Review: Revision.

OMB Control Number: 0503–0028.

Title of Collection: USDA Generic Solution for Solicitation for Funding Opportunity Announcements.

Affected Public: State, Local, and Tribal Governments; Private Sector—businesses or other for-profits and not-for-profit institutions.

Estimated Number of Respondents: 1 million.

Frequency: On occasion.

Total Estimated Annual Responses: 1 million.

Estimated Average Time per Response: 20 hours.

Estimated Total Annual Burden Hours: 20 million hours.

Total Estimated Annual Other Cost Burden: $0.

Stephen O'Neill,

Legislative and Regulatory Division, OBPA–USDA.

[FR Doc. 2023–28571 Filed 12–27–23; 8:45 am]

BILLING CODE 3410–90–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 29, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/*

public/do/PRAMain. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Salmonella Initiative Program (SIP).

OMB Control Number: 0583–0154.

Summary of Collection: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18 and 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, and properly labeled.

Need and Use of the Information: SIP offers incentives to meat and poultry slaughter establishments to control *Salmonella* in their operations. SIP does this by granting waivers of regulatory requirements with the condition that establishments test for *Salmonella, Campylobacter* (if applicable), and generic *E. coli* or other indicator organisms and share all sample results with FSIS. SIP benefits public health because it encourages establishments to test for microbial pathogens, which is a key feature of effective process control.

Description of Respondents: Business or other for-profit.

Number of Respondents: 79.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 17,628.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–28576 Filed 12–27–23; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

[Docket No. NRCS–2023–0018]

Notice of Intent To Prepare an Environmental Impact Statement for the Rattlesnake Creek Watershed Plan, in Stafford, Pratt, Rice, Reno, and Edwards Counties, Kansas

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of intent (NOI) to prepare an environmental impact statement (EIS).

SUMMARY: The Natural Resources Conservation Service (NRCS) Kansas State Office in cooperation with U.S. Army Corps of Engineers (USACE), U.S. Fish and Wildlife Service (USFWS), Environmental Protection Agency (EPA), Kansas Department of Health and the Environment (KDHE), Kansas Department of Agriculture (KDA), and Big Bend Groundwater Management District 5 (GMD–5) (project sponsor), announces its intent to prepare a watershed plan and EIS for the Rattlesnake Creek Watershed Plan, in Stafford County, KS. The proposed watershed plan will examine alternative solutions for GMD–5 to provide agricultural water management measures to Rattlesnake Creek and Quivira National Wildlife Refuge (NWR). NRCS is requesting comments to identify significant issues, potential alternatives, information, and analysis relevant to the proposed action from all interested individuals, Federal and State agencies, and Tribes.

DATES: We will consider comments that we receive by February 12, 2024. Comments received after close of the comment period will be considered to the extent possible.

ADDRESSES: We invite you to submit comments in response to this notice. You may submit your comments through one of the methods below:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and search for docket ID NRCS–2023–0018. Follow the online instructions for submitting comments; or
- *Mail or Hand Delivery:* Larry Schieferecke, Kansas State Conservation Engineer, USDA, NRCS, Kansas State Office, 760 South Broadway Boulevard, Salina, Kansas 67401–4604. In your comments, specify the docket ID NRCS–2023–0018.

All comments received will be posted without change and made publicly available on *www.regulation.gov.*

FOR FURTHER INFORMATION CONTACT: Larry Schieferecke; telephone: (785) 823–4534; email: *larry.schieferecke@usda.gov.* Individuals who require alternative means for communication should contact the U.S. Department of Agriculture (USDA) Target Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Purpose and Need

The primary purpose of the watershed plan is to provide for long-term, sustainable agricultural water management within the Rattlesnake Creek subbasin, including project components to address the impairment at Quivira NWR. GMD–5 has been awarded federal funding from NRCS through the Watershed Protection and Flood Prevention Act (Pub. L. 83–566, 16 U.S.C. 1001–1008—referred to as PL–566 in this document) to provide for long-term, sustainable agricultural water management within the Rattlesnake Creek subbasin of GMD–5, including project components to help address the impairment at Quivira NWR. The project is essential for the Quivira NWR's ongoing senior water right impairment (as described below), and the importance of groundwater to the agricultural economy. The sustainability of Quivira NWR relies on surface water diversions that the KDA Division of Water Resource (KDA–DWR) has deemed impaired due to junior groundwater pumping. A predictable and consistent source of water is also required to support the region's agricultural economy. Providing long-term agricultural water management for the region would help provide water resources for both the agricultural economy and help remedy Quivira NWR's impaired senior water right.

A project will be developed through the preparation of the EIS that would assure a water supply for Quivira NWR while considering and minimizing economic impacts to the surrounding agricultural economy. In the state of Kansas, the use of water is monitored and regulated by KDA–DWR. Individuals that use the state water resources for any purpose other than domestic use is required to obtain a permit, or ''water right.'' The state regulates the water use under the prior appropriation doctrine, which provides priority access to individuals with older (or senior) water rights during water shortages as opposed to individuals with newer (or junior) water rights. The

state does not guarantee the availability of a certain amount of water. The water right holder is entitled to the authorized amount while considering seniority and the natural availability of water and entitled to divert water at times when it is most beneficial. Impairment could still occur because sufficient water is unavailable when the water is most beneficial, even though it is available on an annual basis. The 22,135 acre Quivira NWR is located at the northeastern end of the subbasin and Rattlesnake Creek flows through the refuge before discharging into the Arkansas River. The USFWS holds Water Right File Number 7,571 for the management of Quivira NWR. This water right, which is senior in priority to approximately 95 percent of all other water rights in the Rattlesnake Creek subbasin, has been impaired frequently over the past 20 years as determined by the KDA Chief Engineer.

Surface water and groundwater are essential resources to the central Kansas economy and environment. Management of the Rattlesnake Creek subbasin and its interrelated water resources has been difficult and complex because it involves administration of multiple users of a limited resource. The resource is relied upon for ecosystem sustainability (through management of surface water at the Quivira NWR; Recreational use) and for irrigated agriculture (through groundwater pumping), all of which are of equal importance in Kansas. To regulate water use, the state of Kansas uses a system of water rights, which dictates when and how much water may be diverted by users.

GMD–5 can assist the state of Kansas with the management of groundwater through various options. KDA–DWR has determined that surface water flows have been insufficient to support management practices at Quivira NWR during certain years and periods within those years because of the reductions in streamflow caused by groundwater use. Finding an agreeable solution that balances the needs of the Quivira NWR while limiting impacts to agriculture has been challenging.

Preliminary Proposed Action and Alternatives

The objective of the EIS is to formulate and evaluate alternatives for agricultural water needs and augmentation of wellfield and associated pipeline of water to Rattlesnake Creek upstream of Quivira NWR. This EIS is expected to evaluate three alternatives: two action alternatives, and one no action alternative. The alternatives that may be considered for detailed analysis include:

- *Alternative 1—Proposed Action—Augmentation Wellfield and Groundwater Use Reduction Alternative:* The proposed action is to construct an augmentation wellfield and associated pipeline that provides 15 to 18 cubic feet per second (cfs) of water to Rattlesnake Creek upstream of Quivira NWR. Additionally, 2,500 acres of targeted water right retirements and compensated conservation measures would be implemented. Finally, the proposed action would implement a multi-stakeholder adaptive management approach that would evaluate the success of the augmentation wellfield, water right retirements, and compensated conservation measures on an annual basis, and decrease pumping or increase groundwater retirements as needed to meet the Quivira NWR management goals and objectives.

- *Alternative 2—No Action Alternative:* Taking no action predicts USFWS, the senior water right holder in the basin, will file a request to secure water with KDA–DWR for the impairment finding to the Quivira NWR if the project were not authorized and implemented under the PL–566 program. KDA–DWR would then administer the water right consistent with Kansas Statutes Annotated 82a-706b, which would restrict junior water right irrigation within the basin for irrigated crops. The decrease in irrigation will have severe negative effects to the local agricultural economy and agricultural producers due to decreased crop yields.

- *Alternative 3—Groundwater Use Reduction Alternative:* The groundwater use reduction alternative would rely solely on reductions in groundwater use without development of an augmentation wellfield to increase Rattlesnake Creek streamflow. The groundwater use reduction alternative would incorporate the establishment of either a local enhancement management area (LEMA) or an intensive groundwater use control area (IGUCA). Either a LEMA or an IGUCA would implement measures to reduce groundwater use to avoid an impairment to the senior water right held by the USFWS. This alternative would allow GMD–5 to develop or initiate groundwater reduction measures prior to KDA–DWR enforcement; whereas the no-action alternative could potentially lead to water enforcement activities that are determined by KDA–DWR.

Summary of Expected Impacts

The following affected environment categories had the largest comparative difference and are heavily weighted in the proposed action alternative selection process.

- Aquifers and Sole Source Aquifers;
- Environmental Justice and Socioeconomic Status;
- Surface Water Resources and Water Quality; and
- Riparian Area.

All three alternatives have beneficial impacts to Rattlesnake Creek and Quivira NWR. The modeling data shows that all three alternatives will meet USFWS's water right. However, the Augmentation Wellfield and Groundwater Use Reduction Alternative would have the most immediate beneficial impact to Rattlesnake Creek and Quivira NWR following construction of the augmentation wellfield. Additionally, the Quivira NWR water needs would be met by engaging the augmentation wellfield pumps rather than relying on rainfall and climate conditions.

The No Action and Groundwater Use Reduction alternatives both resulted in a reduction in irrigation pumping that provides beneficial impacts outside of Rattlesnake Creek and Quivira NWR that include benefits to the local aquifer, surface water resources, and riparian areas. The reduction in irrigation pumping that causes an increase in Rattlesnake Creek flow and available water to Quivira NWR results in benefits to the local aquifer, and in effect, the surrounding streams, wetlands, and riparian areas. These effects benefit fish and wildlife resources including wildlife habitat and potentially threatened and endangered species outside of Quivira NWR. The human environment is improved by having a diversity of species and increased water resources in a relatively dry climate.

Though the Augmentation Wellfield and Groundwater Used Reduction Alternative includes a reduction in irrigation pumping (2,500 acre-feet per year), the primary water source is augmentation wellfield pumping. There are minimal beneficial impacts to areas outside Rattlesnake Creek and Quivira NWR compared to the No Action and Groundwater Use Reduction alternatives.

Under the No Action and Groundwater Use Reduction alternatives, the reduction in irrigation pumping comes at a significant cost to the regional economy and has a negative impact on low-income populations. In summary, the analysis showed the following for each alternative based on different crop scenarios:

• No Action Alternative: Net farm income under this alternative would decrease between $6.1 million and $12.1 million, annually, as compared to existing conditions.

• Augmentation Wellfield and Groundwater Use Reduction Alternative: Net farm income under this alternative would increase between $6.0 million and $11.8 million annually, relative to the No Action Alternative and would decrease between $0.1 million and $0.3 million annually, as compared to existing conditions.

• Groundwater Use Reduction Alternative: This alternative would lead to a reduction in net farm income of between $586,000 and $788,000 annually, relative to the No Action Alternative and would be a decrease of $5.5 million and $11.3 million annually, as compared to existing conditions.

Anticipated Permits and Authorizations

The following permits and authorizations are anticipated to be required:

• *Clean Water Act Section 404.* A Clean Water Act section 404 permit must be obtained from the USACE to account for fills within jurisdictional waters of the United States (WOTUS). If needed, GMD–5 will obtain a Clean Water Act section 404 permit prior to construction.

• *Endangered Species Act Section 7.* GMD–5 is currently developing a Biological Assessment (BA) to support ESA section 7 consultation with the USFWS.

• *National Historic Preservation Act (NHPA) Section 106.* A Cultural Resources Inventory Report will be prepared and submitted to the Kansas State Historic Preservation Office (SHPO) for concurrence. Based on results in the report, the Kansas SHPO will make a determination on whether the project may affect cultural resources that are either listed on or eligible for listing in the National Register of Historic Places (NRHP).

• *State Sensitive Species.* GMD–5 will consult with the Kansas Department of Wildlife and Parks (KDWP) for activities that may affect state threatened or endangered species. If needed, the KDWP is required to issue special action permits for activities that may affect these species or state-designated critical habit.

• *National Pollutant Discharge Elimination System and Storm Water Pollution Prevention Plan.* A construction site discharge permit (NPDES) is required by the KDHE on behalf of the EPA if a construction site footprint is greater than 1 acre. Construction of the Proposed Action would involve more than 1 acre of disturbance; therefore, a Stormwater Pollution Prevention Plan (SWPPP) will be developed to minimize pollution from soil erosion and other sources during construction.

• *Construction Permits.* Any construction permits required from Stafford County will be obtained prior to construction.

Schedule of Decision-Making Process

A Draft EIS (DEIS) will be prepared and circulated for review and comment by agencies, Tribes, consulting parties, and the public for at least 45 days as required by 40 CFR 1503.1, 1502.20, 1506.11, and 1502.17, and 7 CFR 650.13. The DEIS is anticipated to be published in the **Federal Register**, approximately 6 months after publication of this NOI. A Final EIS is anticipated to be published within 6 months of completion of the public comment period for the DEIS.

NRCS will decide whether to implement one of the alternatives as evaluated in the EIS. A Record of Decision will be completed after the required 30-day waiting period and will be publicly available. The responsible Federal official and decision maker for the NRCS is the Kansas NRCS State Conservationist.

Public Scoping Process

Federal, State, Tribal, local agencies and representatives, and the public were invited to take part in this watershed plan scoping period through which coordination, sought input on issues of economic, environmental, cultural, and social importance in the watershed.

An open house public meeting was held January 13, 2022, from 4–6 p.m. in the Community Room at the Stafford County Annex in St. John, Kansas. The purpose of the meeting was to share information about the watershed planning process and to gather feedback from the public on how to improve agricultural water supply and fish and wildlife habitat within the Rattlesnake Creek Watershed in Stafford County. Approximately 31 people signed into the meeting.

Public notices advertising the meeting were published in the *Great Bend Tribune, Hutchinson News, Stafford Courier, Pratt Tribune, and Saint John News* newspapers. Postcard invitations were sent to approximately 775 citizens and other interested parties near the proposed project area. A meeting notice was also published on the GMD–5's website.

Information shared at the meeting included the project background and location, project purpose and need, description of the purpose of and process for developing a watershed plan, environmental considerations within the project area, organizational information about the NRCS and GMD–5, and methods for providing public input. Draft scoping information and an executive summary were also provided at the meeting.

The project team received 11 comments during the specified 30-day comment period (December 29, 2021, through January 31, 2022).

Identification of Potential Alternatives, Information, and Analyses

NRCS invites agencies, Tribes, consulting parties, and individuals that have special expertise, legal jurisdiction, or interest in the Rattlesnake Creek Watershed project to provide comments concerning the scope of the analysis and identification of potential alternatives, information, and analyses relevant to the Proposed Action in writing.

NRCS will coordinate the scoping process to correspond with any required NHPA processes, as allowed in 36 CFR 800.2(d)(3) and 800.8 (54 U.S.C. 306108). The information about historic and cultural resources within the area potentially affected by the proposed Rattlesnake Creek project will assist NRCS in identifying and evaluating impacts to such resources in the context of both the National Environmental Policy Act (NEPA) and NHPA.

NRCS will consult with Native American tribes on a government-to-government basis in accordance with 36 CFR 800.2 and 800.3, Executive Order 13175, and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources and historic properties, will be given due consideration.

Authorities

This document is published pursuant to the NEPA regulations regarding publication of a NOI to issue an EIS (40 CFR 1501.9(d)). Watershed planning is authorized under the Watershed Protection and Flood Prevention Act of 1954, as amended, and the Flood Control Act of 1944.

Federal Assistance Programs

The title and number of the Federal Assistance Program as found in the Assistance Listing [1] to which this document applies is 10.904, Watershed Protection and Flood Prevention.

[1] See *https://sam.gov/content/assistance-listings.*

Executive Order 12372

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. This Rattlesnake Creek project is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

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In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or the USDA TARGET Center at (202) 720–2600 (voice and text telephone) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any phone). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at: *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632 9992. Submit your completed form or letter to USDA by: (1) mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov*.

USDA is an equal opportunity provider, employer, and lender.

Kristin Ethridge,

Kansas Acting State Conservationist, Natural Resources Conservation Service.

[FR Doc. 2023–28592 Filed 12–27–23; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–876]

Welded Line Pipe From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that SeAH Steel Corporation (SeAH), a producer/exporter of welded line pipe, did not make sales of subject merchandise at less than normal value (NV) during the period of review (POR), December 1, 2021, through November 31, 2022. Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Adam Simons, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6172.

SUPPLEMENTARY INFORMATION:

Background

On February 2, 2023, based on timely requests for review, in accordance with 19 CFR 351.221(c)(1)(i), we initiated an administrative review of the antidumping duty order on welded line pipe from the Republic of Korea (Korea).[1] On February 14, 2023, NEXTEEL Co., Ltd. (NEXTEEL) timely withdrew its request for review.[2] On March 10 and 14, 2023, Hyundai Steel Company (Hyundai Steel) and Husteel Co., Ltd. (Husteel), respectively, timely withdrew their requests for review.[3] On August 10, 2023, we extended the preliminary results of this review to no later than December 20, 2023.[4]

For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[5] For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of the topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Scope of the Order

The merchandise subject to the *Order* is welded line pipe from Korea. The product is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 7305.11.1030, 7305.11.1060, 7305.11.5000, 7305.12.1030, 7305.12.1060, 7305.12.5000, 7305.19.1030, 7305.19.5000, 7306.19.1010, 7306.19.1050, 7306.19.5110, and 7306.19.5150. Although the HTSUS subheadings are provided for convenience and for customs purposes, the written product description remains dispositive. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if a party who requested a review

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 7060 (February 2, 2023); *see also Welded Line Pipe from the Republic of Korea and the Republic of Turkey: Antidumping Duty Orders,* 80 FR 75056, 75057 (December 1, 2015) (*Order*).

[2] *See* NEXTEEL's Letter, ''Withdrawal of Request for Administrative Review,'' dated February 14, 2023.

[3] *See* Hyundai Steel's Letter, ''Withdrawal of Request for Administrative Review,'' dated March 10, 2023; and Husteel's Letter, ''Withdrawal of Request for Administrative Review,'' dated March 14, 2023.

[4] *See* Memorandum, ''Extension of Deadline for Preliminary Results of 2021–2022 Antidumping Duty Administrative Review,'' dated August 10, 2023.

[5] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the 2021–2022 Administrative Review of the Antidumping Duty Order on Welded Line Pipe from Korea,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

withdraws its request within 90 days of the date of publication of notice of initiation. As noted above, the following companies timely withdrew their review requests and no other party requested an administrative review of these companies: Husteel, Hyundai Steel, and NEXTEEL. Therefore, we are rescinding this administrative review with respect to these companies, pursuant to 19 CFR 351.213(d)(1).

Methodology

Commerce is conducting this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act.

Preliminary Results of Review

As a result of this review, we preliminarily determine the following weighted-average dumping margin exists for the period December 1, 2021, through November 30, 2022:

Producer/exporter	Weighted-average dumping margin (percent)
SeAH Steel Corporation	0.00

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to interested parties within five days after the date of publication of this notice.[6] Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[7] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[8] All briefs must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety in ACCESS by 5:00 p.m. Eastern Time on the established deadline.

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their briefs that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[9] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[10]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Oral presentations at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, Commerce will inform parties of the scheduled date for the hearing.[11]

Assessment Rates

Upon issuing the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), SeAH did not report actual entered value for all of its U.S. sales; in such instances, we calculated importer-specific per-unit duty assessment rates by aggregating the total amount of antidumping duties calculated for the examined sales and dividing this amount by the total quantity of those sales. Where either the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Commerce's ''automatic assessment'' practice will apply to entries of subject merchandise during the POR produced by SeAH for which it did not know that the merchandise it sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

Because Commerce is rescinding this review with respect to Husteel, Hyundai Steel, and NEXTEEL, Commerce will instruct CBP to assess antidumping duties on all appropriate entries of subject merchandise during the POR for these companies at rates equal to the cash deposit rate of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue its rescission instructions to CBP no earlier than 35 days after the date of publication of this notice in the **Federal Register**.

Commerce intends to issue assessment instructions to CBP regarding SeAH no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated or reviewed companies not covered in this review, the cash deposit rate will continue to be the company-specific cash deposit rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, or the less-than-fair-value (LTFV) investigation, but the manufacturer is, then the cash deposit rate will be the rate established for the most recent segment for the

[6] *See* 19 CFR 351.224(b).

[7] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Final Service Rule*).

[8] *See* 19 351.309(c)(2) and (d)(2).

[9] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[10] *See APO and Final Service Rule.*

[11] *See* 19 CFR 351.310(d).

manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 4.38 percent, the all-others rate established in the LTFV investigation.[12] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 20, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2023–28585 Filed 12–27–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–820]

Silicon Metal From Malaysia: Final Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that silicon metal from Malaysia was not sold in the United States at less than normal value during the period of review (POR), February 1, 2021, through July 31, 2022.

DATES: Applicable December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Rachel Jennings, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1110.

SUPPLEMENTARY INFORMATION:

Background

This administrative review covers one producer/exporter of silicon metal from Malaysia, PMB Silicon Sdn. Bhd (PMB Silicon).[1] On September 12, 2023, Commerce published the *Preliminary Results* of this administrative review and invited parties to comment.[2] No interested party submitted comments on the *Preliminary Results*.[3] Accordingly, the final results remain unchanged from the *Preliminary Results*.[4] Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [5]

The merchandise under review is all forms and sizes of silicon metal, including silicon metal powder. Silicon metal contains at least 85.00 percent but less than 99.99 percent silicon, and less than 4.00 percent iron, by actual weight. Semiconductor grade silicon (merchandise containing at least 99.99 percent silicon by actual weight and classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2804.61.0000) is excluded from the scope of this review.

Silicon metal is currently classifiable under subheadings 2804.69.1000 and 2804.69.5000 of the HTSUS. Although the HTSUS numbers are provided for convenience and customs purposes, the written description of the merchandise under review is dispositive.

Final Results of Review

Commerce determines that the following estimated weighted-average dumping margin exists for the period February 1, 2021, through July 31, 2022:

Exporter/producer	Weighted-average dumping margin (percent)
PMB Silicon Sdn. Bhd	0.00

Disclosure

Because Commerce received no comments on the *Preliminary Results,* we have not modified our analysis and no decision memorandum accompanies this **Federal Register** notice. We are adopting the *Preliminary Results* as the final results of this review. Consequently, there are no new calculations to disclose in accordance with 19 CFR 351.224(b) for these final results.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b)(1), Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. Where the respondent's weighted-average dumping margin is either zero or *de minimis* (*i.e.,* less than 0.5 percent), we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. Accordingly, because PMB Silicon's weighted-average dumping margin is zero percent, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For entries of subject merchandise during the POR produced by PMB Silicon for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[6]

We intend to instruct CBP to take into account the ''provisional measures deposit cap,'' in accordance with 19 CFR 351.212(d). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 71829 (October 18, 2022).

[2] *See Silicon Metal from Malaysia: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 62537 (September 12, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[3] We received comments from Globe Specialty Metals, Inc. and Mississippi Silicon LLC (collectively, the petitioners), requesting that Commerce refer certain record information to U.S. Customs and Border Protection (CBP) for further evaluation. Because these comments do not concern the *Preliminary Results,* we do not find it necessary to address the petitioners' request in a decision memorandum; we do, however, intend to refer the information to CBP with these final results, consistent with the request. *See* Petitioners' Letter, ''Case Brief,'' dated December 6, 2023.

[4] For a complete description of our analysis, *see* the *Preliminary Results.*

[5] *See Silicon Metal from Malaysia: Antidumping Duty Order,* 86 FR 46677 (August 19, 2021) (*Order*).

[6] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[12] *See Order.*

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for PMB Silicon will be the rates established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 12.27 percent, the all-others rate established in the LTFV investigation.[7] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5) and 19 CFR 351.213(h)(2).

Dated: December 21, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2023–28692 Filed 12–27–23; 8:45 am]

BILLING CODE 3510–DS–P

[7] *See Silicon Metal from Malaysia: Final Affirmative Determination of Sales at Less Than Fair Value,* 88 FR 33224 (June 24, 2021).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–830]

Certain Stainless Steel Plate in Coils From Taiwan: Rescission of Antidumping Duty Administrative Review; 2022–2023

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty order on certain stainless steel plate in coils (SS plate in coils) from Taiwan for the period of review (POR) May 1, 2022, through April 30, 2023.

DATES: Applicable December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Rebecca Janz, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2972.

SUPPLEMENTARY INFORMATION:

Background

On May 2, 2023, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on SS plate in coils from Taiwan.[1] On May 31, 2023, North American Stainless and Outokumpu Stainless USA, LLC, (the domestic interested parties) submitted a timely request that Commerce conduct an administrative review.[2]

On July 12, 2023, Commerce published in the **Federal Register** a notice of initiation of administrative review with respect to imports of SS plate in coils exported and/or produced by the companies listed in the domestic interested parties' request for review, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.221(c)(1)(i).[3] On July 12, 2023, we placed on the record U.S. Customs and Border Protection (CBP) data for entries of SS plate in coils from Taiwan during the POR, showing no reviewable entries, and invited interested parties to comment.[4] No interested party submitted comments to Commerce.

Additionally, on August 16, 2023, Commerce notified all interested parties of its intent to rescind the instant review in full because there were no reviewable, suspended entries of subject merchandise by any of the companies subject to this review during the POR and invited interested parties to comment.[5] No interested party submitted comments to Commerce.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(3), it is Commerce's practice to rescind an administrative review of an antidumping duty order when there are no reviewable entries of subject merchandise during the POR for which liquidation is suspended.[6] Normally, upon completion of an administrative review, the suspended entries are liquidated at the antidumping duty assessment rate calculated for the review period.[7] Therefore, for an administrative review to be conducted, there must be at least one reviewable, suspended entry that Commerce can instruct CBP to liquidate at the antidumping duty assessment rate calculated for the review period.[8] As noted above, there were no entries of subject merchandise for any of the companies subject to this review during the POR. Accordingly, in the absence of suspended entries of subject merchandise during the POR, we are hereby rescinding this administrative

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review and Join Annual Inquiry Service List,* 88 FR 27445 (May 2, 2023).

[2] *See* Domestic Interested Parties' Letter, ''Domestic Interested Parties' Request for Initiation of Administrative Review,'' dated May 31, 2023.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 44262 (July 12, 2023).

[4] *See* Memorandum, ''Customs Entry Data from U.S. Customs and Border Protection,'' dated July 12, 2023.

[5] *See* Commerce's Letter, ''Notice of Intent to Rescind Review,'' dated August 16, 2023

[6] *See, e.g., Dioctyl Terephthalate from the Republic of Korea: Rescission of Antidumping Administrative Review; 2021–2022,* 88 FR 24758 (April 24, 2023); *see also Certain Carbon and Alloy Steel Cut-to Length Plate from the Federal Republic of Germany: Recission of Antidumping Administrative Review; 2020–2021,* 88 FR 4157 (January 24, 2023).

[7] *See* 19 CFR 351.212(b)(1).

[8] *See* 19 CFR 351.213(d)(3).

review, in its entirety, in accordance with 19 CFR 351.213(d)(3).

Assessment

Commerce will instruct CBP to assess antidumping duties on all appropriate entries. Antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of this rescission notice in the **Federal Register**.

Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: December 6, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2023–28686 Filed 12–27–23; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–829]

Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results of the Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) finds that certain producers/exporters subject to this administrative review made sales of subject merchandise at less than normal value during the period of review (POR) July 1, 2021, through June 30, 2022.

DATES: Applicable December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Benito Ballesteros or Seth Brown, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–7425 or (202) 482–0029, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2023, Commerce published the *Preliminary Results* in the **Federal Register**.[1] On November 6, 2023, Commerce extended the time period for issuing the final results of this review until December 21, 2023.[2] For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[3] Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order[4]

The merchandise subject to the *Order* is steel concrete reinforcing bar imported in either straight length or coil form (rebar) regardless of metallurgy, length, diameter, or grade or lack thereof.[5]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of the issues that parties raised, and to which we responded in the Issues and Decision Memorandum, is attached to this notice in Appendix I. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we made certain changes to the margin calculations for Kaptan Demir Celik Endustrisi Ve Ticaret A.S./Kaptan Metal Dis Ticaret Ve Nakliyat A.S. (collectively, Kaptan).[6]

Final Results of Review

As a result of this review, we determine the following estimated weighted-average dumping margins for the period July 1, 2021, through June 30, 2022:

Producer or exporter	Weighted-average dumping margin (percent)
Colakoglu Metalurji A.S./Colakoglu Dis Ticaret A.S	0.00
Kaptan Demir Celik Endustrisi Ve Ticaret A.S./Kaptan Metal Dis Ticaret Ve Nakliyat A.S	25.86
Companies Not Selected for Individual Review[7]	25.86

[1] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 50100 (August 1, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review; 2021–2022,'' dated November 6, 2023.

[3] *See* Memorandum, '' Steel Concrete Reinforcing Bar from the Republic of Turkey: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See Steel Concrete Reinforcing Bar from the Republic of Turkey and Japan: Amended Final Affirmative Antidumping Duty Determination for the Republic of Turkey and Antidumping Duty Orders,* 82 FR 32532 (July 14, 2017), as amended by *Notice of Court Decision Not in Harmony with the Amended Final Determination in the Less-Than-Fair-Value Investigation; Notice of Amended Final Determination,* 87 FR 934 (January 22, 2022) (collectively, *Order*).

[5] For a complete description of the scope of the *Order, see Preliminary Results* PDM.

[6] For a full description of changes, *see* Issues and Decision Memorandum.

Disclosure

Commerce intends to disclose the calculations performed for Kaptan in connection with these final results to interested parties within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review.

Pursuant to 19 CFR 351.212(b)(1), because both Colakoglu Metalurji A.S./Colakoglu Dis Ticaret A.S. (collectively, Colakoglu) and Kaptan reported the entered value for their U.S. sales, we calculated importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those same sales. Where either a respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. For the companies identified in Appendix II that were not selected for individual examination, we will instruct CBP to liquidate entries at the rate established in these final results of review.

Commerce's ''automatic assessment'' practice will apply to entries of subject merchandise during the POR produced by Colakoglu or Kaptan for which the producer did not know that the merchandise it sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[8]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies under review will be equal to the weighted-average dumping margin that is established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated or reviewed companies not covered in this review, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, or the less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the cash deposit rate established for the most recently completed segment for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 3.90 percent, the all-others rate established in the LTFV investigation.[9] These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or increase in the amount of antidumping duties by the amount of the countervailing duties.

Administrative Protective Order (APO)

This notice serves as the only reminder to parties subject to APO of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 20, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix I—List of Topics Discussed in the Issues and Decision Memorandum

Appendix II—List of Companies Not Selected for Individual Examination

1. Diler Dis Ticaret A.S.
2. Ekinciler Demir ve Celik Sanayi A.S.
3. Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S.
4. Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S.
5. Sami Soybas Demir Sanayi ve Ticaret A.S.

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[7] The exporters or producers not selected for individual review are listed in Appendix II.

[8] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[9] *See Order,* 87 FR at 935.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–971]

Multilayered Wood Flooring From the People's Republic of China: Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review; 2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily

determines that countervailable subsidies are being provided to producers and exporters of multilayered wood flooring (wood flooring) from the People's Republic of China (China). The period of review (POR) is January 1, 2021, through December 31, 2021. Interested parties are invited to comment on these preliminary results of review.

DATES: Applicable December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Craig Matney or Jonathan Schueler, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2429 or (202) 482–9175, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 2011, Commerce issued a countervailing duty order on wood flooring from China.[1] The American Manufacturers of Multilayered Wood Flooring (the petitioner) and other interested parties requested that Commerce conduct an administrative review of the *Order.* On February 2, 2023, Commerce published in the **Federal Register** a notice of initiation of an administrative review of the *Order.*[2] We initiated an administrative review with respect to 86 producers/exporters of wood flooring from China for the POR.

For events that occurred since the *Initiation Notice, see* the Preliminary Decision Memorandum.[3] The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed at *https://access.trade.gov/public/FRNoticesListLayout.aspx.* A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix I to this notice.

Scope of the Order

The product covered by the *Order* is wood flooring from China. For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

Final Rescission of Review, in Part

On September 27, 2023, Commerce notified interested parties that we intended to rescind this administrative review with respect to the companies listed in Appendix II, in the absence of suspended entries during the POR.[4] No party commented on our Intent to Rescind Memorandum. As a result, we are rescinding this review, in part, with respect to the 70 companies listed in Appendix II, pursuant to 19 CFR 351.213(d)(3) and (4).

In addition, the following parties submitted no-shipment certifications: Anhui Longhua Bamboo Product Co., Ltd.; Benxi Flooring Factory (General Partnership); Dalian Jiahong Wood Industry Co., Ltd.; Dalian Shengyu Science and Technology Development Co., Ltd.; Dongtai Fuan Universal Dynamics, LLC; Dunhua City Dexin Wood Industry Co., Ltd.; Dunhua Shengda Wood Industry Co., Ltd.; HaiLin LinJing Wooden Products Co., Ltd.; Jiangsu Keri Wood Co., Ltd.; Jiangsu Mingle Flooring Co., Ltd.; Jiangsu Simba Flooring Co., Ltd.; Jiashan On-Line Lumber Co., Ltd.; Kingman Wood Industry Co., Ltd.; Pinge Timber Manufacturing (Zhejiang) Co., Ltd. (Pinge Timber); Power Dekor Group Co. Ltd.; Sino-Maple (Jiangsu) Co., Ltd.; Suzhou Dongda Wood Co., Ltd.; Tongxiang Jisheng Import and Export Co., Ltd.; Zhejiang Dadongwu Green Home Wood Co., Ltd.; and Zhejiang Shiyou Timber Co., Ltd. All of these companies were included in the Intent to Rescind Memorandum with the exception of Pinge Timber.[5] Therefore, as explained above, we are rescinding the review with regard to all these companies, except for Pinge Timber. Our analysis of the U.S. Customs and Border (CBP) information placed on the record shows that Pinge Timber made shipments of subject merchandise during the POR.[6] Therefore, we are preliminarily treating Pinge Timber as a non-selected company under review. For further discussion on the decision not to rescind the review with respect to Pinge Timber's entry, *see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found to be countervailable, we preliminarily determine that there is a subsidy, *i.e.,* a financial contribution by an ''authority'' that confers a benefit to the recipient, and that the subsidy is specific.[7] For a full description of the methodology underlying our preliminary conclusions, including our reliance, in part, on adverse facts available pursuant to sections 776(a) and (b) of the Act, *see* the Preliminary Decision Memorandum.

Preliminary Rate for Non-Selected Companies Under Review

As discussed above, Commerce initiated this administrative review with respect to 86 producers/exporters. We are rescinding the review for 70 companies listed in Appendix II that had no suspended entries during the POR. As discussed above, this group includes 19 companies that certified no shipments during the POR. In addition, Commerce selected two mandatory respondents, Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. (Jiangsu Senmao) and Riverside Plywood Corp. (Riverside Plywood) for individual examination.[8] For the remaining 12 companies subject to this review, but not selected for individual examination, because the rates calculated for mandatory respondents Jiangsu Senmao and Riverside Plywood were above *de minimis* and not based entirely on facts available, we applied a subsidy rate based on a weighted-average of the subsidy rates calculated for these mandatory respondents using the publicly ranged sales data they submitted on the record. This methodology is consistent with our practice for establishing an all-others subsidy rate pursuant to section 705(c)(5)(A) of the Act. For further information on the calculation of the non-selected respondent rate, *see* the

[1] *See Multilayered Wood Flooring from the People's Republic of China: Countervailing Duty Order,* 76 FR 76693 (December 8, 2011); and *Multilayered Wood Flooring from the People's Republic of China: Amended Antidumping and Countervailing Duty Orders,* 77 FR 5484 (February 3, 2012), wherein the scope of the order was modified (collectively, *Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 7060 (February 2, 2023). (*Initiation Notice*).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Results in the Countervailing Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China; 2021,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See* Memorandum, ''Notice of Intent to Rescind Review, In Part,'' dated September 27, 2023 (Intent to Rescind Memorandum).

[5] *See* Intent to Rescind Memorandum.

[6] *See* Memorandum, ''U.S. Customs and Border Protection (''CBP'') Entry Documents,'' dated October 31, 2023.

[7] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

[8] Riverside Plywood's cross-owned affiliates (*i.e.,* Baroque Timber Industries (Zhongshan) Co., Ltd.; Suzhou Times Flooring Co., Ltd.; and Zhongshan Lianjia Flooring Co., Ltd. Both Baroque Timber Industries (Zhongshan) Co., Ltd. and Suzhou Times Flooring Co., Ltd.) were listed separately in the *Initiation Notice.*

section in the Preliminary Decision Memorandum entitled ''Non-Selected Companies Under Review.'' For a list of the non-selected companies, *see* Appendix III to this notice.

Preliminary Results of the Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated a countervailable subsidy rate for each of the mandatory respondents, Jiangsu Senmao and Riverside Plywood, and their cross-owned affiliates, where applicable. We preliminarily find the following countervailable subsidy rates to exist:

Producer/exporter	Subsidy rate (percent *ad valorem*)
Jiangsu Senmao Bamboo and Wood Industry Co., Ltd	5.12
Riverside Plywood Corp. and its Cross-Owned Affiliates [9]	23.65
Non-Selected Companies Under Review [10]	17.18

Disclosure and Public Comment

We intend to disclose the calculations performed to parties within five days after the date of publication of this notice.[11] Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs to Commerce no later than 30 days after the date of the publication of this notice.[12] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[13] Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.[14]

As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.[15] Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[16]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. An electronically filed hearing request must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.

Final Results

Unless the deadline is extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of the issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h).

Assessment Rates

In accordance with 19 CFR 351.221(b)(4)(i), we are preliminarily assigning subsidy rates in the amounts shown above for the producer/exporters subject to review. Upon completion of the administrative review, consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries covered by this review.

For the companies for which this review is rescinded, Commerce will instruct CBP to assess countervailing duties on all appropriate entries at a rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period January 1, 2021, through December 31, 2021, in accordance with 19 CFR 351.212(c)(l)(i). Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the preliminary results of this review in the **Federal Register**.

For the companies for which this review is not rescinded, Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, Commerce intends, upon publication of the final results, to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown for each of the respective companies listed above and in Appendix III on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits at the most recent company-specific or all-others rate applicable to the company. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

These preliminary results are issued and published pursuant to sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: December 20, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Non-Selected Companies Under Review
IV. Scope of the *Order*
V. Diversification of China's Economy
VI. Use of Facts Otherwise Available and Application of Adverse Inferences
VII. Subsidies Valuation
VIII. Interest Rate Benchmarks, Discount Rates, Inputs, Land-Use Benchmarks,

[9] Cross-owned affiliates are: Baroque Timber Industries (Zhongshan) Co., Ltd.; Suzhou Times Flooring Co., Ltd.; and Zhongshan Lianjia Flooring Co., Ltd.

[10] *See* Appendix III.

[11] *See* 19 CFR 351.224(b).

[12] *See* 19 CFR 351.309.

[13] *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077 (September 29, 2023) (*APO and Final Service Rule*).

[14] *See* 19 351.309(c)(2) and (d)(2)

[15] We use the term ''issue'' here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

[16] *See APO and Final Service Rule.*

and Electricity Benchmarks
IX. Analysis of Programs
X. Recommendation

Appendix II

Companies with Respect to Which Commerce Is Rescinding Its Review

1. Anhui Boya Bamboo & Wood Products Co., Ltd.
2. Anhui Longhua Bamboo Product Co., Ltd.
3. Anhui Yaolong Bamboo & Wood Products Co. Ltd.
4. Armstrong Wood Products (Kunshan) Co., Ltd.
5. Benxi Flooring Factory (General Partnership)
6. Benxi Wood Company
7. Changzhou Hawd Flooring Co., Ltd.
8. Dalian Guhua Wooden Product Co., Ltd.
9. Dalian Huilong Wooden Products Co., Ltd.
10. Dalian Jaenmaken Wood Industry Co., Ltd.
11. Dalian Jiahong Wood Industry Co., Ltd.
12. Dalian Kemian Wood Industry Co., Ltd.
13. Dalian Qianqiu Wooden Product Co., Ltd.
14. Dalian Shengyu Science and Technology Development Co., Ltd.
15. Dalian T-Boom Wood Products Co., Ltd.
16. Dongtai Fuan Universal Dynamics, LLC
17. Dun Hua Sen Tai Wood Co., Ltd.
18. Dunhua City Dexin Wood Industry Co., Ltd.
19. Dunhua City Hongyuan Wood Industry Co., Ltd.
20. Dunhua City Jisen Wood Industry Co., Ltd.
21. Dunhua Shengda Wood Industry Co., Ltd.
22. Fusong Jinqiu Wooden Product Co., Ltd.
23. Guangzhou Homebon Timber Manufacturing Co., Ltd.
24. HaiLin LinJing Wooden Products Co., Ltd.
25. Hangzhou Hanje Tec Company Limited
26. Hangzhou Zhengtian Industrial Co., Ltd.
27. Hong Kong Chuanshi International
28. Hunchun Forest Wolf Wooden Industry Co., Ltd.
29. Hunchun Xingjia Wooden Flooring Inc.
30. Huzhou Chenghang Wood Co., Ltd.
31. Huzhou Sunergy World Trade Co., Ltd.
32. Jiangsu Keri Wood Co., Ltd.
33. Jiangsu Mingle Flooring Co., Ltd.
34. Jiangsu Simba Flooring Co., Ltd.
35. Jiangsu Yuhui International Trade Co., Ltd.
36. Jiashan On-Line Lumber Co., Ltd.
37. Jiaxing Hengtong Wood Co., Ltd.
38. Jilin Xinyuan Wooden Industry Co., Ltd.
39. Karly Wood Product Limited
40. Kember Flooring, Inc. (also known as Kember Hardwood Flooring, Inc.)
41. Kemian Wood Industry (Kunshan) Co., Ltd.
42. Kingman Wood Industry Co., Ltd.
43. Kornbest Enterprises Limited
44. Les Planchers Mercier, Inc.
45. Linyi Anying Wood Co., Ltd.
46. Linyi Youyou Wood Co., Ltd. (successor-in-interest to Shanghai Lizhong Wood Products Co., Ltd.) (a/k/a TheLizhong Wood Industry Limited Company of Shanghai)
47. Logwin Air and Ocean Hong Kong
48. Muchsee Wood (Chuzhou) Co., Ltd.
49. Power Dekor Group Co. Ltd.
50. Power Dekor North America Inc.
51. Samling Elegant Living Trading (Labuan) Ltd.
52. Samling Global USA, Inc.
53. Scholar Home (Shanghai) New Material Co. Ltd.
54. Shanghai Lairunde Wood
55. Shanghaifloor Timber (Shanghai) Co., Ltd.
56. Sino-Maple (Jiangsu) Co., Ltd.
57. Suzhou Dongda Wood Co., Ltd.
58. Tech Wood International Ltd.
59. Tongxiang Jisheng Import and Export Co., Ltd.
60. Xiamen Yung De Ornament Co., Ltd.
61. Xuzhou Shenghe Wood Co., Ltd.
62. Yekalon Industry, Inc.
63. Yihua Lifestyle Technology Co., Ltd. (successor-in-interest to Guangdong Yihua Timber Industry Co., Ltd.)
64. Yingyi-Nature (Kunshan) Wood Industry Co., Ltd.
65. Zhejiang Dadongwu Green Home Wood Co., Ltd.
66. Zhejiang Jiechen Wood Industry Co., Ltd.
67. Zhejiang Longsen Lumbering Co., Ltd.
68. Zhejiang Shiyou Timber Co., Ltd.
69. Zhejiang Shuimojiangnan New Material Technology Co., Ltd.
70. Zhejiang Simite Wooden Co., Ltd.

Appendix III

Non-Selected Companies Under Review

1. Dalian Penghong Floor Products Co., Ltd.
2. Dalian Shumaike Floor Manufacturing Co., Ltd.
3. Fine Furniture (Shanghai) Limited [17]
4. Fusong Jinlong Wooden Group Co., Ltd.
5. Fusong Qianqiu Wooden Product Co., Ltd.
6. Huzhou Fulinmen Imp. & Exp. Co., Ltd.
7. Huzhou Jesonwood Co., Ltd.
8. Jiangsu Guyu International Trading Co., Ltd.
9. Jiashan HuiJiaLe Decoration Material Co., Ltd.
10. Metropolitan Hardwood Floors, Inc.
11. Pinge Timber Manufacturing (Zhejiang) Co., Ltd.
12. Zhejiang Fuerjia Wooden Co., Ltd.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD570]

Fisheries of the Exclusive Economic Zone Off Alaska; North Pacific Halibut and Sablefish Individual Fishing Quota Cost Recovery Program

AGENCY: National Marine Fisheries Service (NMFS); National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of standard prices and fee percentage.

SUMMARY: NMFS publishes the individual fishing quota (IFQ) standard prices and fee percentage for cost recovery for the IFQ Program for the halibut and sablefish fisheries of the North Pacific (IFQ Program). The fee percentage for 2023 is 3.0 percent. This action is intended to provide holders of halibut and sablefish IFQ permits with the 2023 standard prices and fee percentage to calculate the required payment for IFQ cost recovery fees due by January 31, 2024.

DATES: The standard prices and fee percentages are valid on December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Charmaine Weeks, Fee Coordinator, 907–586–7231.

SUPPLEMENTARY INFORMATION:

Background

NMFS Alaska Region administers the IFQ Program in the North Pacific. The IFQ Program is a limited access system authorized by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Northern Pacific Halibut Act of 1982 (Halibut Act). Fishing under the IFQ Program began in March 1995. Regulations implementing the IFQ Program are set forth at 50 CFR part 679.

In 1996, the Magnuson-Stevens Act was amended to, among other purposes, require the Secretary of Commerce to collect a fee to recover the actual costs directly related to the management and enforcement of any individual quota program. This requirement was further amended in 2006 to include collection of the actual costs of data collection and to replace the reference to ''individual quota program'' with a more general reference to ''limited access privilege program'' at section 304(d)(2)(A) of the Magnuson-Stevens Act. Section 304(d)(2) of the Magnuson-Stevens Act also specifies an upper limit on these fees, when the fees must be collected, and where the fees must be deposited.

On March 20, 2000, NMFS published regulations at § 679.45 to implement cost recovery for the IFQ Program (65 FR 14919, March 20, 2000). Under the regulations, an IFQ permit holder must pay a cost recovery fee for every pound of IFQ halibut and sablefish that is landed on their IFQ permit(s), including any halibut that is landed as guided angler fish. The IFQ permit holder is responsible for self-collecting the fee for all IFQ halibut and sablefish landings on their permit(s). The IFQ permit holder is also responsible for submitting

[17] Commerce previously found Great Wood (Tonghua) Ltd. and Fine Furniture Plantation (Shishou) Ltd. to be cross-owned with Fine Furniture (Shanghai) Limited. *See Multilayered Wood Flooring from the People's Republic of China: Final Affirmative Countervailing Duty Determination*,76 FR 64313 (October 18, 2011).

IFQ fee payments(s) to NMFS on or before January 31 of the year following the year in which the IFQ landings were made. The total dollar amount of the fee is determined by multiplying the NMFS published fee percentage by the ex-vessel value of all IFQ landings made on the permit(s) during the IFQ fishing year. As required by § 679.45(d)(1) and (d)(3)(i), NMFS publishes this notice of the fee percentage for the IFQ halibut and sablefish fisheries in the **Federal Register** during or prior to the last quarter of each year.

Standard Prices

The fee is based on the sum of all payments from for example, fish processors, made to fishermen for the sale of the fish during the year. This includes any retro-payments (*e.g.,* bonuses, delayed partial payments, post-season payments) made to the IFQ permit holder for previously landed IFQ halibut or sablefish.

For purposes of calculating IFQ cost recovery fees, NMFS distinguishes between two types of ex-vessel value: actual and standard. Actual ex-vessel value is the amount of all compensation, monetary or non-monetary, that an IFQ permit holder received as payment for his or her IFQ fish sold. Standard ex-vessel value is the default value used to calculate the fee. IFQ permit holders have the option of using actual ex-vessel value if they can satisfactorily document it; otherwise, the standard ex-vessel value is used.

Section 679.45(b)(3)(iii) requires the Regional Administrator to publish IFQ standard prices during the last quarter of each calendar year. These standard prices are used, along with estimates of IFQ halibut and IFQ sablefish landings, to calculate standard ex-vessel values. The standard prices are described in U.S. dollars per IFQ equivalent pound for IFQ halibut and IFQ sablefish landings made during the 2023 year. According to § 679.2, IFQ equivalent pound(s) means the weight amount, recorded in pounds, and calculated as round weight for sablefish and headed and gutted weight for halibut, for an IFQ landing. The weight of halibut in pounds landed as guided angler fish is converted to IFQ equivalent pound(s) as specified in 50 CFR 300.65(c)(5)(ii)(E). NMFS calculates the standard prices to closely reflect the variations in the actual ex-vessel values of IFQ halibut and IFQ sablefish landings by month and port or port-group. The standard prices for IFQ halibut and IFQ sablefish are listed in the tables that follow the next section. Data from ports are combined as necessary to protect confidentiality.

Fee Percentage

NMFS calculates the fee percentage each year according to the factors and methods described at § 679.45(d)(2). NMFS determines the fee percentage that applies to landings made in the previous year by dividing the total costs directly related to the management, data collection, and enforcement of the IFQ Program (management costs) during the previous year by the total standard ex-vessel value of halibut and sablefish IFQ landings made during the previous year (fishery value). NMFS identifies the actual management costs associated with certain management, data collection, and enforcement functions through an established accounting system that allows staff to track labor, travel, contracts, rent, and procurement. NMFS calculates the fishery value as described under the section **STANDARD PRICES.**

Using the fee percentage formula described above, NMFS determined that the percentage of management costs to fishery value for the 2023 calendar year is 3.4 percent of the standard ex-vessel value; however, the fee percentage must not exceed 3.0 percent pursuant to § 304(d)(2)(B) of the Magnuson-Stevens Act. Therefore, the 2023 fee percentage is set at 3.0 percent. An IFQ permit holder is to use the fee percentage of 3.0 percent to calculate their fee for IFQ equivalent pound(s) landed during the 2023 halibut and sablefish IFQ fishing season. An IFQ permit holder is responsible for submitting the 2023 IFQ fee payment to NMFS on or before January 31, 2024. Payment must be made in accordance with the payment methods set forth in § 679.45(a)(4)(iv). Payment can be made using credit card, debit card, or electronic check via the *pay.gov* program. NMFS does not accept credit card information by phone or in-person for fee payments.

The 2023 fee percentage of 3.0 percent is higher than the 2022 fee percentage of 1.9 percent (87 FR 79869, December 28, 2022). Between 2022 and 2023 there was a net increase in management costs and a net decrease in fishery value. Management costs increased by approximately 15 percent while fishery value decreased by approximately 34 percent. The net decrease in value was due to lower ex-vessel prices and landings for both halibut and sablefish IFQ fisheries.

TABLE 1—REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR THE 2023 IFQ SEASON [1]

Landing location	Period ending	Halibut standard ex vessel price	Sablefish standard ex vessel price
HOMER:			
	March 31	6.00	1.27
	April 30	6.02	1.19
	May 31	5.48	1.02
	June 30	6.08	3.12
	July 31	5.87	.....
	August 31	5.26	2.00
	September 30	4.81	1.80
	October 31	4.81	1.80
	November 30	4.81	1.80
	December 31	4.81	1.80
KETCHIKAN:			
	March 31	.....	.....
	April 30	6.60	.....
	May 31	6.76	.....
	June 30	.....	.....
	July 31	.....	.....
	August 31	6.16	.....
	September 30	.....	.....
	October 31	.....	.....
	November 30	.....	.....

TABLE 1—REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR THE 2023 IFQ SEASON [1]—Continued

Landing location	Period ending	Halibut standard ex vessel price	Sablefish standard ex vessel price
	December 31		
KODIAK:			
	March 31		
	April 30	5.22	1.00
	May 31	5.06	1.39
	June 30	5.13	1.70
	July 31	5.18	1.50
	August 31	5.10	1.50
	September 30	4.42	1.15
	October 31	4.42	1.15
	November 30	4.42	1.15
	December 31	4.42	1.15
PETERSBURG:			
	March 31		
	April 30		
	May 31	5.91	
	June 30		
	July 31		
	August 31		
	September 30		
	October 31		
	November 30		
	December 31		
SEWARD:			
	March 31	6.21	1.49
	April 30	5.86	1.31
	May 31	5.41	1.47
	June 30		
	July 31		
	August 31		
	September 30		
	October 31		
	November 30		
	December 31		
BERING SEA: [2]			
	March 31		
	April 30	5.59	1.26
	May 31	5.41	1.48
	June 30		1.18
	July 31	5.39	1.04
	August 31	5.01	1.32
	September 30	4.82	1.35
	October 31	4.82	1.35
	November 30	4.82	1.35
	December 31	4.82	1.35
CENTRAL GULF OF ALASKA: [3]			
	March 31	6.03	1.16
	April 30	5.79	1.29
	May 31	5.32	1.45
	June 30	5.81	1.84
	July 31	5.74	1.60
	August 31	5.27	1.67
	September 30	4.73	1.33
	October 31	4.73	1.33
	November 30	4.73	1.33
	December 31	4.73	1.33
SOUTHEAST ALASKA: [4]			
	March 31	6.87	2.21
	April 30	6.22	1.90
	May 31	5.93	1.85
	June 30	5.86	2.06
	July 31	5.81	2.36
	August 31	5.75	2.57
	September 30	5.26	1.91
	October 31	5.26	1.91
	November 30	5.26	1.91
	December 31	5.26	1.91
ALL-ALASKA: [5]			
	March 31	6.62	1.89

TABLE 1—REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR THE 2023 IFQ SEASON [1]—Continued

Landing location	Period ending	Halibut standard ex vessel price	Sablefish standard ex vessel price
ALL: [5]	April 30	6.02	1.50
	May 31	5.63	1.58
	June 30	5.77	1.73
	July 31	5.68	1.59
	August 31	5.34	1.79
	September 30	4.90	1.55
	October 31	4.90	1.55
	November 30	4.90	1.55
	December 31	4.90	1.55
	March 31	6.62	1.89
	April 30	6.02	1.50
	May 31	5.63	1.58
	June 30	5.77	1.73
	July 31	5.68	1.59
	August 31	5.34	1.79
	September 30	4.90	1.55
	October 31	4.90	1.55
	November 30	4.90	1.55
	December 31	4.90	1.55

[1] **Note:** In many instances, prices are not shown in order to comply with confidentiality guidelines when there are fewer than three processors operating in a location during a month. Additionally, landings at different harbors in the same general location (*e.g.* ''Juneau, Douglas, and Auke Bay'') have been combined to report landings to the main port (*e.g.,* ''Juneau'').

[2] *Landing Locations Within Port Group—Bering Sea:* Adak, Akutan, Akutan Bay, Atka, Bristol Bay, Chefornak, Dillingham, Captains Bay, Dutch Harbor, Egegik, Ikatan Bay, Hooper Bay, King Cove, King Salmon, Kipnuk, Mekoryuk, Naknek, Nome, Quinhagak, Savoonga, St. George, St. Lawrence, St. Paul, Togiak, Toksook Bay, Tununak, Beaver Inlet, Ugadaga Bay, Unalaska.

[3] *Landing Locations Within Port Group—Central Gulf of Alaska:* Anchor Point, Anchorage, Alitak, Chignik, Cordova, Eagle River, False Pass, West Anchor Cove, Girdwood, Chinitna Bay, Halibut Cove, Homer, Kasilof, Kenai, Kenai River, Alitak, Kodiak, Port Bailey, Nikiski, Ninilchik, Old Harbor, Palmer, Sand Point, Seldovia, Resurrection Bay, Seward, Valdez, Whittier.

[4] *Landing Locations Within Port Group—Southeast Alaska:* Angoon, Baranof Warm Springs, Craig, Edna Bay, Elfin Cove, Excursion Inlet, Gustavus, Haines, Hollis, Hoonah, Hyder, Auke Bay, Douglas, Tee Harbor, Juneau, Kake, Ketchikan, Klawock, Metlakatla, Pelican, Petersburg, Portage Bay, Port Alexander, Port Graham, Port Protection, Point Baker, Sitka, Skagway, Tenakee Springs, Thorne Bay, Wrangell, Yakutat.

[5] *Landing Locations Within Port Group—All:* For Alaska: All landing locations included in 1, 2, and 3. For California: Eureka, Fort Bragg, Other California. For Oregon: Astoria, Aurora, Lincoln City, Newport, Warrenton, Other Oregon. For Washington: Anacortes, Bellevue, Bellingham, Nagai Island, Edmonds, Everett, Granite Falls, Ilwaco, La Conner, Port Angeles, Port Orchard, Port Townsend, Ranier, Fox Island, Mercer Island, Seattle, Standwood, Other Washington. For Canada: Port Hardy, Port Edward, Prince Rupert, Vancouver, Haines Junction, Other Canada.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 22, 2023.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28707 Filed 12–27–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[AIT–231220A–SL]

Notice of Availability of Software and Documentation for Licensing

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Availability of WIFI Distinct Native Attribute (DNA) Fingerprinting Demonstration Code.

SUMMARY: Pursuant to the provisions of section 801 of Public Law 113–66 (2014 National Defense Authorization Act); the Department of the Air Force announces the availability of WIFI Distinct Native Attribute (DNA) Fingerprinting Demonstration Code, V23, dated 15 Nov 2023, to include source code (MATLAB m-files), experimentally collected WIFI data (MATLAB mat-files), and operation checking (Ops Check) documentation software and related documentation for to illustrate some basic elements of Distinct Native Attribute (DNA) fingerprinting. DNA fingerprints are extracted from radio frequency device emissions and used to discriminate (uniquely identify) specific hardware devices using machine learning (ML) techniques. The demonstrated discriminability is akin to using human fingerprints and/or human DNA to discriminate (identify) individuals. The package includes a series of folders and code for performing end-to-end DNA fingerprinting. The folders are sequentially numbered and include some experimentally collected WiFi signals; some 1D and 2D fingerprint extraction/generation code, and some machine learning code for performing the discrimination. All of the code includes header information indicating contributing researchers and appropriate references for signals and systems where the DNA fingerprinting has been demonstrated.

ADDRESSES: Licensing interests should be sent to AFIT ORTA, 2950 Hobson Way, Wright-Patterson AFB, OH 45433; 937–255–3633; or Email: *AFIT.CZ.ORTA@us.af.mil.* Include Docket No. AIT–231220–SL in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: AFIT ORTA, 2950 Hobson Way, Wright-Patterson AFB, OH 45433; 937–255–3633; or Email: *AFIT.CZ.ORTA@us.af.mil.*

SUPPLEMENTARY INFORMATION: None.

Authority: Section 801 of Public Law 113–66 (2014 National Defense Authorization Act).

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–28624 Filed 12–27–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting Notice—Military Justice Review Panel

AGENCY: General Counsel of the Department of Defense, Department of Defense (DoD).

ACTION: Notice of meeting.

SUMMARY: The DoD is publishing this notice to announce that the Military Justice Review Panel will host an open meeting on January 16–17, 2024.

DATES: Tuesday, January 16, 2024—Open to the public from 9:45 a.m. to 11:45 a.m. and 12:45 p.m. to 2 p.m. eastern standard time (EST) and Wednesday, January 17, 2024—Open to the public from 10:15 a.m. to 12 p.m. and 1 p.m. to 2:45 p.m. EST.

ADDRESSES: This meeting will be held at the General Gordon R. Sullivan Conference and Event Center, 2425 Wilson Blvd., Arlington, VA 22201. The meeting can be accessed virtually via the following dial-in number and links: Dial-in: +1 646 828 7666, Meeting ID: 161 535 0618 Passcode: 654321. Link: *https://www.zoomgov.com/j/1615350618?pwd=NFowUHFKSVQvOUprZUFaOVd6RmxJZz09.* Meeting ID: 161 535 0618 Passcode: 654321. For those who would like to attend, please send registration information to *whs.pentagon.em.mbx.mjrp@mail.mil,* providing your name, email, organization (if applicable), and telephone number.

FOR FURTHER INFORMATION CONTACT: Mr. Pete L. Yob, 703–693–3857 (Voice), *louis.p.yob.civ@mail.mil* (Email). Mailing address is MJRP, One Liberty Center, 875 N Randolph Street, Suite 150, Arlington, Virginia 22203. The most up-to-date changes to the meeting agenda can be found on the website: *https://mjrp.osd.mil.*

SUPPLEMENTARY INFORMATION: Pursuant to § 5521 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, as amended by § 531(k) of the FY 2018 NDAA, the Secretary of Defense established this panel to conduct independent periodic reviews and assessments of the operation of the Uniform Code of Military Justice (UCMJ). (10 U.S.C. 946. Art. 146 (effective Jan 1, 2019)).

Purpose of the Meeting: Pursuant to UCMJ, Article 146, the MJRP shall conduct independent periodic reviews and assessments of the operation of the UCMJ. This will be the ninth meeting held by the MJRP. On Day 1, the MJRP will hold two open sessions. The first session will be composed of former military judges. After a lunch break, the MJRP will hear from a panel of special victims' counsel. On Day 2, MJRP members will hold two open sessions. First, the MJRP will hear from a panel composed of military appellate government counsel followed by a second session composed of military appellate defense counsel.

Dated: December 21, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–28717 Filed 12–27–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Office of Indian Education Formula Grants to Local Educational Agencies

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2024 for Office of Indian Education (OIE) Formula Grants to Local Educational Agencies (Formula Grants), Assistance Listing Number 84.060A. This notice relates to the approved information collection under OMB control number 1810–0021.

DATES:

Part I of Electronic Application System for Indian Education (EASIE) Applications Available: February 5, 2024.

Deadline for Transmittal of EASIE Part I: March 8, 2024.

Part II of EASIE Applications Available: April 1, 2024.

Deadline for Transmittal of EASIE Part II: May 10, 2024.

FOR FURTHER INFORMATION CONTACT: For questions about the Formula Grants program, contact Crystal C. Moore, U.S. Department of Education, 400 Maryland Avenue SW, MS 6335, Washington, DC 20202–6335. Telephone: (202) 987–0607. Email: *crystal.moore@ed.gov.*

For technical questions about the EASIE application and uploading documentation, contact the Partner Support Center (PSC). Telephone: 877–457–3336. Email: *OIE.EASIE@ed.gov.*

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

Note: Applicants must meet the deadlines for both EASIE Part I and Part II to be eligible to receive a grant. Failure to submit the required supplemental documentation, described under *Content and Form of Application Submission* in section IV of this notice, by the EASIE Part I or II deadline, will result in an incomplete application that will not be considered for funding. OIE recommends uploading the documentation at least 4 days prior to the deadlines to ensure that any potential submission issues are resolved prior to the deadlines.

I. Funding Opportunity Description

Purpose of Program: The Formula Grants program provides grants to support local educational agencies (LEAs), Indian Tribes and organizations, and other eligible entities in developing and implementing elementary and secondary school programs that serve Indian students. These funds must be used to support comprehensive programs that are designed to meet the unique cultural, language, and educational needs of American Indian and Alaska Native (AIAN) students and ensure that all students meet challenging State academic standards. The information gathered from the project's final annual performance report (APR) will be utilized to complete OIE's required annual reporting. Specifically, that report covers the Secretary's established performance measures for assessing the effectiveness and efficiency of the Formula Grants program as detailed in this notice.

Integration of Services Authorized: As authorized under section 6116 of the Elementary and Secondary Education Act of 1965, as amended (ESEA), the Secretary will, upon receipt of an acceptable plan for the integration of education and related services, and in cooperation with other relevant Federal agencies, authorize the entity receiving the funds under this program to consolidate all Federal funds that are to be used exclusively for Indian students. Instructions for submitting an integration of education and related services plan are included in EASIE, which is described under *Application and Submission Information* in section IV of this notice.

Note: Under the Formula Grants program, all applicants are required to develop proposed projects in open consultation, including through public hearings to provide a full opportunity to understand the program and to offer recommendations regarding the program

(section 6114(c)(3)(C) of the ESEA), with parents and teachers of Indian children, representatives of Indian Tribes on Indian lands located within 50 miles of any school that the LEA will serve if such Tribes have any children in such school, Indian organizations (IOs), and, if appropriate, Indian students from secondary schools. LEA applicants are required to develop proposed projects with the participation and written approval of an Indian Parent Committee whose membership includes parents and family members of Indian children in the LEA's schools; representatives of Indian Tribes on Indian lands located within 50 miles of any school that the LEA will serve if such Tribes have any children in such school; teachers in the schools; and, if appropriate, Indian students attending secondary schools of the LEA (ESEA section 6114(c)(4)). The majority of the Indian Parent Committee members must be parents and family members of Indian children (ESEA section 6114(c)(4)(B)).

Definition: The following definition is from ESEA section 6112(d)(3):

Indian community-based organization (ICBO) means any organization that (1) is composed primarily of Indian parents, family members, and community members, Tribal government education officials, and Tribal members, from a specific community; (2) assists in the social, cultural, and educational development of Indians in such community; (3) meets the unique cultural, language, and academic needs of Indian students; and (4) demonstrates organizational and administrative capacity to manage the grant.

Statutory Hiring Preference: Awards are subject to the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5307(b)). To the greatest extent feasible, a grantee is required to—

(1) Give to Indians preferences and opportunities for training and employment in connection with the administration of the grant; and

(2) Give to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452(e)), preference in the award of contracts in connection with the administration of the grant.

For purposes of this requirement, an Indian is a member of any federally recognized Indian Tribe (25 U.S.C. 1452(b)).

Program Authority: 20 U.S.C. 7421, *et seq.*

Note: Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 81, 82, 84, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

II. Award Information

Type of Award: Formula grants.

Estimated Available Funds: The Administration requested $117,381,000 for the Formula Grants program for FY 2024. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Estimated Range of Awards: $4,000 to $2,653,404.

Estimated Average Size of Awards: $86,000.

Estimated Number of Awards: 1,300.

Note: The Department is not bound by any estimates in this notice.

Project Period: 12 months.

III. Eligibility Information

1. *Eligible Applicants:* The following entities are eligible under this program: certain LEAs, as prescribed by ESEA section 6112(b), including charter schools authorized as LEAs under State law; certain schools funded by the Bureau of Indian Education of the U.S. Department of the Interior (BIE), as prescribed by ESEA section 6113(d); Indian Tribes and IOs under certain conditions, as prescribed by ESEA section 6112(c); and ICBOs, as prescribed by ESEA section 6112(d). Consortia of two or more eligible entities are also eligible under certain circumstances, as prescribed by ESEA section 6112(a)(4).

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Supplement Not Supplant:* ESEA section 6114(c)(1) requires an LEA to use these grant funds only to supplement the funds that, in the absence of these Federal funds, such agency would make available for services described in this application, and not to supplant such funds.

c. *Indirect Cost Rate Information:* This program uses a restricted indirect cost rate. For more information regarding restricted indirect costs, or to obtain a negotiated restricted indirect cost rate, please see: *www2.ed.gov/about/offices/list/ocfo/intro.html.*

d. *Administrative Cost Limitation:* Under ESEA section 6115(d), no more than five percent of funds awarded for a grant under this program may be used for administrative purposes. Note that, since fiscal year 2020, Congress has included language in appropriations acts to clarify that the statutory 5 percent limit does not include indirect costs. In the event such language is not included in the FY 2024 appropriations act, the Department will work with successful applicants to make budget adjustments to align with administrative cost restrictions, if necessary.

IV. Application and Submission Information

1. *How to Request an Application Package:* You can obtain an entity-specific link for the electronic application for grants under this program by contacting the PSC listed under **FOR FURTHER INFORMATION CONTACT**.

On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit and technical assistance resources, are located on the EASIE Communities of Practice website at *https://easie.communities.ed.gov/.*

Note: OIE and PSC will provide comprehensive documentation to support applicants and grantees with accessing, navigating, and entering data and submitting their responses into the Office of Management and Budget (OMB) MAX Survey. Prior to the opening of EASIE Part I, this documentation will be announced and posted on the EASIE Communities of Practice website at: *https://easie.communities.ed.gov/.*

User accounts were replaced with an entity-specific link (also known as a token) to access the EASIE application in the OMB MAX Survey. Only individuals that are registered as the

current Point of Contact (POC), Project Director (PD), or Authorized Official Representative (AOR) will receive the entity-specific link to access the application for EASIE Part I and II. The AOR can continue to delegate the responsibility of completing the EASIE application in the new OMB MAX Survey to other entity contacts by sharing their entity-specific link internally. The AOR is ultimately responsible for reviewing and certifying the application. Please contact the PSC with any questions related to this change.

Supplementary Documentation: The EASIE application requires submission of the following supplementary documentation in electronic Portable Document Format (PDF):

(1) In EASIE Part I, applicants that are Tribes, IOs, or ICBOs must submit the appropriate ''Applying in Lieu of the LEA'' agreement form with their application to verify their eligibility no later than March 8, 2024 (which is the closing date of EASIE Part I). Each separate eligibility document is identified by applicant type as either Tribe Applying in Lieu of an LEA Agreement; IO Agreement; or ICBO Agreement. These are available on the EASIE Communities of Practice website (*https://easie.communities.ed.gov/*) as downloadable documents. The details of the verification process, which are necessary to meet the statutory eligibility requirements for Tribes, IOs, and ICBOs, are in the application package.

(2) In EASIE Part I, the lead applicant for a consortium must use the consortium agreement form that is available on the Getting Started page in the EASIE Portal as a downloadable document and upload it to EASIE no later than March 8, 2024 (the closing date of EASIE Part I).

(3) In EASIE Part II, for an applicant that is an LEA or a consortium of LEAs, the EASIE application requires the electronic PDF submission of the Indian Parent Committee Approval form no later than May 10, 2024 (which is the deadline for transmittal of EASIE Part II). Applicants are encouraged to begin planning parent committee meetings early to ensure parent committee requirements are met before EASIE Part II closes. The form is available on the EASIE Communities of Practice website at *https://easie.communities.ed.gov/.*

3. *Submission Dates and Times:* Part I of the Formula Grant EASIE Applications Available: February 5, 2024.

Deadline for Transmittal of EASIE Part I: March 8, 2024, 11:59 p.m., Eastern Time.

Part II of the Formula Grant EASIE Applications Available: April 1, 2024.

Deadline for Transmittal of EASIE Part II: May 10, 2024, 11:59 p.m., Eastern Time.

Submit applications for grants under this program electronically using EASIE located in the OIE-provided portal. For information (including dates and times) about how to submit your application, please refer to *Other Submission Requirements* in section IV of this notice.

OIE will only consider applications that are compliant with deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT**. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Unique Entity Identification (UEI) Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department, you must—

a. Have a Unique Entity Identification (UEI) number and a Taxpayer Identification Number (TIN);

b. Register both your UEI number and TIN with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your UEI number and TIN on your SAM application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a UEI number from *Sam.gov* at the following website: *https://sam.gov/.* A UEI number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2 to 5 weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter in the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your UEI number and TIN. We strongly recommend that you register early.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your UEI number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *https://sam.gov/.* To further assist you with obtaining and registering your UEI number and TIN in SAM or updating your existing SAM account, we have prepared a *SAM.gov* Tip Sheet, which you can find here: *www2.ed.gov/about/offices/list/ofo/docs/unique-entity-identifier-transition-fact-sheet.pdf.*

6. *Other Submission Requirements:*

a. *Electronic Submission of Applications.*

EASIE is an electronic application within OMB MAX Survey that users access via an entity-specific link. It is divided into two parts: EASIE Part I and EASIE Part II.

EASIE Part I (student count) provides the appropriate data entry screens to submit verified, aggregated, Indian student count totals based on either the Indian School Equalization Program (ISEP) count or the Indian Student Eligibility Certification Form (ED 506 Form). All applicants must submit a current Indian student count for FY 2024. Applicants must use the ED 506 Form to document eligible Indian students; however, BIE schools may use either the ISEP count or the ED 506 Form count to verify their Indian student counts. Applicants must protect the privacy of all individual data collected and only report aggregated data to the Secretary.

Applicants that verify their Indian student count with the ED 506 Form must document their Indian student counts by completing the following: (1) annually, the applicant must verify there is a valid ED 506 Form for each Indian child included in the count; (2) all ED 506 Forms included in the count must be completed, signed, and dated by the parent or legal guardian, and be on file with the applicant; (3) the applicant must maintain a copy of the student enrollment roster(s) covering the same period of time indicated in the application as the count period; and (4) each Indian child included in the count

must be listed on the LEA's enrollment roster(s) and in attendance for at least 1 day during the count period.

BIE schools that enter an ISEP count to verify their Indian student count must use the most current Indian student count certified by the BIE.

Once an Indian child is determined to be eligible to be counted for such grant award, the applicant must maintain a record of such determination and must not require a new or duplicate determination or form to be made for such child for a subsequent application for a grant under this program.

Applicants must indicate the time span for the project objectives and corresponding activities and services for AIAN students. Applicants can choose to set objectives that remain the same for up to four years to facilitate data collection and enhance long-term planning.

In EASIE Part II, all applicants are required to—

(1) Select the type of program being submitted as either regular formula grant project, formula grant project consolidated with a Title I schoolwide program, or integration of services under ESEA section 6116;

(2) Select the grade levels offered by the LEA or BIE school;

(3) Identify, from a list of possible Department grant programs (*e.g.,* ESEA Title I), the programs in the LEA that are currently coordinated with a Formula Grant project, or with which the school district plans to coordinate during the project year, in accordance with ESEA section 6114(c)(5), and describe the comprehensive program for AIAN students with those grant programs;

(4) Describe the professional development opportunities that will be provided as part of a comprehensive program to ensure that teachers and other school professionals who are new to the Indian community are prepared to work with Indian children, and that all teachers who will be involved in programs assisted by this grant have been properly trained to carry out such programs, as required by ESEA section 6114(b)(5);

(5) Provide information on how the State assessment data of all Indian students (not just those served) are used and how such information will be disseminated to the Indian community, Indian Parent Committee, and Indian Tribes whose children are served by the LEA. Also describe how assessment data from the previous school year (SY) were used, as required by ESEA section 6114(b)(6);

(6) Indicate when the public hearing was held for SY 2024–25, as required by ESEA section 6114(c)(3)(C);

(7) For an applicant that is an LEA, BIE school, or a consortium of LEAs or BIE schools, describe the process the applicant used to meaningfully collaborate with Indian Tribes located in the community in a timely, active, and ongoing manner in the development of the comprehensive program and the actions taken as a result of such collaboration (ESEA section 6114(b)(7));

(8) Identify specific project objectives that will further the goal of providing culturally responsive education for AIAN students to meet their academic needs and help them meet State achievement standards (ESEA section 6115(b));

(9) For an LEA that selects a schoolwide application, identify how the use of such funds in a schoolwide program will produce benefits to Indian students that would not be achieved if the funds were not used in a schoolwide program (ESEA section 6115(c)(3));

(10) Submit a program budget and justification based on the estimated grant amount that the EASIE calculates from the Indian student count submitted in EASIE Part I. After the initial grant amounts are determined, additional funds may become available due to such circumstances as withdrawn applications or a reduction in another applicant's student count. An applicant whose award amount increases or decreases more than $5,000 must submit a revised budget prior to receiving its grant award but will not need to re-certify its application. If an applicant's award amount increases or decreases by less than $5,000, a budget update is not required. For an applicant that receives an increased award amount following submission of its original budget, the applicant must allocate the increased amount only to previously approved budget categories;

(11) As required by section 427 of the General Education Provisions Act (GEPA), describe the steps the applicant proposes to take to ensure equitable access to, and participation in, the project or activity to be conducted with such assistance, by addressing the special needs of students, teachers, and other program beneficiaries in order to overcome barriers to equitable participation, including barriers based on gender, race, color, national origin, disability, and age; and

(12) If needed, provide additional comments to assist OIE in the review of the application.

Registration for Formula Grant EASIE: Current, former, and new applicants interested in submitting a Formula Grants application must register for EASIE. Prior to the opening of EASIE Part I, PSC will send a broadcast to prior year grantees and new prospective applicants that have contacted PSC and registered for EASIE. All recipients who receive PSC's broadcast will be asked to complete their intent to apply for the upcoming application period in the EASIE Portal. All prospective applicants will be provided the opportunity to confirm if any updates to their registration information are necessary, and/or if they would like to completely decline registration. Entities that do not have an active registration or are new applicants should contact the PSC listed under **FOR FURTHER INFORMATION CONTACT** to register any time before the EASIE Part I application deadline date. Registration *does not* serve as the entity's grant application. For assistance registering, contact the PSC listed under **FOR FURTHER INFORMATION CONTACT.**

Certification for Formula Grant EASIE: The applicant's AOR must be a senior-level official (*e.g.,* Superintendent, Tribal Chief, or similar) of the entity and legally authorized by the applicant organization to approve the application. The AOR must certify EASIE Part I and Part II by the deadline date. Each applicant should identify at least three system users, one for each of the following: Project Director, Authorized Official Representative, and another party (such as a Budget Director) designated to answer questions in the event the project director is unavailable. The certification process ensures that the information in the application is true, reliable, and valid. An applicant that provides a false statement in the application is subject to penalties under the False Claims Act, 18 U.S.C. 1001.

b. *Submission of Paper Applications by Mail.*

We discourage paper applications, but if electronic submission is not possible (*e.g.,* you do not have access to the internet), you must provide a written statement that you intend to submit a paper application. Send this written statement no later than Wednesday, January 31, 2024.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date of EASIE Part I. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date of EASIE Part I. If you email the written statement, it must be sent no later than two weeks before the application deadline date to the person listed under **FOR FURTHER INFORMATION CONTACT.**

Address and mail or fax your statement to: Crystal C. Moore, U.S. Department of Education, Office of

Indian Education, 400 Maryland Avenue SW, MS 6335, Washington, DC 20202–6335. FAX: (202) 205–0606.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

You must mail the original and two copies of your application, on or before the application deadline dates for both EASIE Part I and Part II, to the Department at the following address: U.S. Department of Education, Office of Indian Education, Attention: Crystal Moore, 400 Maryland Avenue SW, MS 6335, Washington, DC 20202–6335.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

We will not consider applications postmarked after the application deadline date for EASIE Part I or Part II.

c. *Submission of Paper Applications by Hand Delivery.*

If you are submitting a paper application, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline dates for both EASIE Part I and Part II, to the Department at the following address: U.S. Department of Education, Office of Indian Education, Attention: Crystal Moore, 400 Maryland Avenue SW, MS 6335, Washington, DC 20202–6335.

The program office accepts hand deliveries daily between 8:00 a.m. and 4:30 p.m., Eastern Time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the Assistance Listing Number, including suffix letter, of this program—84.060A; and

(2) The program office will mail you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should contact the program office at (202) 987–0607.

V. Grant Administration Information

1. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this program the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of a grant in the *Applicable Regulations* section of this notice and include these and other specific conditions in the Grant Award Notification (GAN). The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this program, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) You must submit a final annual performance report (APR) using EASIE via the OMB MAX Survey entity-specific link, including financial information, as directed by the Secretary, within 120 days after the close of the grant year. Grantees will be able to access the APR via the EASIE portal link provided to registered entities prior to the system being open to users. Grantees will receive an email from the PSC identifying the date that the APR will be available to grantees and the deadline for its transmission.

4. *Performance Measures:* For the purposes of Department reporting under 34 CFR 75.110, the Secretary has established the following key performance measures for assessing the effectiveness and efficiency of the Formula Grants program: (1) the percentage of AIAN students in grades four and eight who score at or above the basic level in reading on the National Assessment of Educational Progress (NAEP); (2) the percentage of AIAN students in grades four and eight who score at or above the basic level in mathematics on the NAEP; (3) the percentage of AIAN students in grades three through eight meeting State achievement standards by scoring at or above the proficient level in reading and mathematics on State assessments; (4) the difference between the percentage of AIAN students in grades three through eight at or above the proficient level in reading and mathematics on State assessments and the percentage of all students scoring at those levels; (5) the percentage of AIAN students who graduate from high school as measured by the 4-year adjusted cohort graduation rate; (6) the percentage of grantees providing culturally responsive activities; and (7) the percentage of funds used by grantees prior to award closeout.

Note: In any year in which NAEP or State assessment data are systematically unavailable, reporting of such data will not be required and will not be used for purposes of performance measures.

5. *Integrity and Performance System:* If you receive an award under this grant program that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through SAM. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the

requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Other Information

Accessible Format: On request to the PSC listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as other documents of this Department published in the **Federal Register**, in text or PDF. To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Adam Schott,

Deputy Assistant Secretary for Policy and Programs Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2023–28597 Filed 12–27–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0183]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Evaluation of A Toolkit To Support Evidence-Based Writing Instruction in Grades 2 Through 4

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before January 29, 2024.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. Reginfo.gov provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Heidi Gansen, (202) 245–6765.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Evaluation of A Toolkit to Support Evidence-Based Writing Instruction in Grades 2 Through 4.

OMB Control Number: 1850–NEW.

Type of Review: New ICR.

Respondents/Affected Public: Individuals or Households *Total Estimated Number of Annual Responses:* 4,188.

Total Estimated Number of Annual Burden Hours: 1,237.

Abstract: The Institute of Education Sciences (IES) within the U.S. Department of Education (ED) requests clearance for data collection activities to support an evaluation of A Toolkit to Support Evidence-Based Writing Instruction in Grades 2 Through 4. Specifically, this request covers collection of data to conduct an evaluation to assess whether implementing the writing toolkit (1) improves teachers' attitudes towards writing and helps them align their writing instruction with the evidence-based recommendations in the What Works Clearinghouse (WWC) Teaching Elementary School Students to Be Effective Writers practice guide and (2) improves students' writing quality and reading achievement. This randomized controlled trial study will compare teacher and student outcomes in schools that implement the writing toolkit (the treatment group) with the teacher and student outcomes in schools that continue to provide their usual professional development supports (the comparison group).

There is a great need for professional learning supports in elementary writing instruction to address low reading and writing proficiency across the country. Teacher preparation programs rarely offer stand-alone writing instruction (Myers et al. 2016; Morgan 2010; Brenner 2013), and surveys show many teachers and teacher educators do not feel confident in writing instruction (Myers et al. 2016; Cutler and Graham 2008). An accessible package of professional learning materials designed to help educators translate evidence-based recommendations for elementary writing instruction into daily instruction could be a game-changer for improving teacher practice and student writing.

The elementary writing toolkit aims to offer such an accessible, evidence-based professional learning package by drawing on the WWC Teaching Elementary School Students to Be Effective Writers practice guide. The practice guide helps to fill the professional development gaps for elementary writing instruction by providing clear, actionable recommendations along with specific implementation steps and examples. The toolkit will build on the practice guide to (1) make the recommendations and implementation guidance accessible and engaging for busy educators, (2) create a structure for learning and applying practices throughout a school year, (3) promote collaborative learning and planning among teachers, and (4) offer tools for sustaining practices over time. The toolkit will be a one-stop shop that enables schools and educators to access all supports in one place, complemented by diagnostic tools to assess practices and resources for school leaders to institutionalize practices over time. Incorporating multimedia resources that are easy to navigate will make the toolkit more inviting and will facilitate the reinforcement of concepts

that are difficult to learn through text alone.

To provide context for the impact findings and inform further development of the toolkit, the evaluation will examine teachers' experiences and engagement in toolkit activities, the learning modules completed, challenges encountered and suggested solutions, feedback on areas to improve the toolkit and institutional supports, and the extent to which the professional development in writing instruction received by teachers differs between treatment and control schools. Obtaining feedback on improving the toolkit, regardless of whether the impact findings are positive, is critical to ensure that the toolkit is as useful as possible to districts, schools, and teachers when they implement the evidence-based practices.

Dated: December 22, 2023.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–28653 Filed 12–27–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–707–000]

Quartz Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Quartz Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 10, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28694 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–720–000]

SJS 1 Storage, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of SJS 1 Storage, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 10, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all

interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

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Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28685 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–719–000]

San Juan Solar 1, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of San Juan Solar 1, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 10, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28687 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Institution of Section 206 Proceedings and Refund Effective Dates

	Docket Nos.
Roundtop Energy LLC	EL24–41–000
Beaver Dam Energy LLC	EL24–42–000
Alpaca Energy LLC	EL24–43–000
Milan Energy LLC	EL24–44–000
Wolf Run Energy LLC	EL24–45–000
Oxbow Creek Energy LLC	EL24–46–000

On December 21, 2023, the Commission issued an order in Docket Nos. EL24–41–000, EL24–42–000, EL24–43–000, EL24–44–000, EL24–45–000, and EL24–46–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation regarding the continued justness and reasonableness of Roundtop Energy LLC, Beaver Dam Energy LLC, Alpaca Energy LLC, Milan Energy LLC, Wolf Run Energy LLC, and Oxbow Creek Energy LLC's Rate Schedules. *Roundtop Energy LLC,* 185 FERC ¶ 61,211 (2023).

The refund effective dates in Docket No. EL24–41–000, et al., established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL24–41–000, et al., must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2022), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal**

Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202)502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28688 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2341–033, 2350–025]

Georgia Power Company; Notice of Intent To Prepare an Environmental Assessment

On December 18, 2018, as supplemented on May 24, 2019, September 6, 2022, September 8, 2022, and November 1, 2023, Georgia Power Company (Georgia Power) filed an application to surrender, decommission, and remove the Langdale Hydroelectric Project No. 2341 and the Riverview Hydroelectric Project No. 2350. The projects are located on the Chattahoochee River in Chambers County, Alabama and Harris County, Georgia. The project does not occupy federal lands.

The Commission issued public notice of the surrender applications for both proceedings on January 24, 2019, with protests, comments, and motions to intervene due to be filed by February 25, 2019. On February 14, 2019, the Commission issued public notice extending the comment and intervention period until March 4, 2019, due to the funding lapse at certain federal agencies between December 22, 2018 and January 25, 2019. Several commenters filed letters opposing the proposed dam removals at both projects while others expressed concern regarding the potential for islands in the river to be subject to increased erosion due to dam removal. Additional comments focused on concern for the potential loss of boating and fishing opportunities, loss of waterfront access from neighboring property, as well as for the continued existence of shoal bass. Letters of support for dam removal were filed by local citizens as well as the Georgia Department of Natural Resources Division of Wildlife Resources and the Chattahoochee Riverkeeper. The Muskogee Nation requested that archeological surveys be conducted prior to dam removal as well as subsequent monitoring to ensure protection of archeological sites.

On September 6, 2022, and supplemented on September 8, 2022, Georgia Power amended its surrender applications by filing the decommissioning plan for both projects. The Commission issued public notice of the decommissioning plan on November 17, 2022, with protests, comments, and motions to intervene due to be filed by December 19, 2022. On December 12, 2022, the FWS filed a letter of support for decommissioning the projects and removing the associated dams. No other comments were received pursuant to the public notice.

On November 1, 2023, Georgia Power filed the following plans: (1) Final Pre-Dam Removal Shoal Bass Abundance and Tracking Study Report; (2) Final Sediment Quality Study Report; (3) Final Sediment Transport Assessment Study Report; and (4) Revised Final Hydraulic and Hydrologic Study Report.

This notice identifies Commission staff's intention to prepare an environmental assessment (EA) for the project. The planned schedule for the completion of the EA is July 2024 [1] Revisions to the schedule may be made as appropriate. The EA will be issued and made available for review by all interested parties. All comments filed on the EA will be reviewed by staff and considered in the Commission's final decision on the proceeding.

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Any questions regarding this notice may be directed to Mark Ivy at 202.502.6156 or *mark.ivy@ferc.gov.*

Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28698 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–706–000]

Northern Orchard Solar PV, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Northern Orchard Solar PV, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888

[1] 42 U.S.C. 4336a(g)(1)(B) requires lead federal agencies to complete EAs within 1 year of the agency's decision to prepare an EA. This notice establishes the Commission's intent to prepare an EA for the project; therefore, the EA must be issued within 1 year of the issuance date of this notice.

First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 10, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28690 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ24–5–000]

City of Azusa, California; Notice of Filing

Take notice that on December 20, 2023, City of Azusa, California submits tariff filing: City of Azusa 2024 Transmission Revenue Balancing Account Adjustment and Existing Transmission Contract Update to be effective 1/1/2024.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Comment Date: 5 p.m. eastern time on January 10, 2024.

Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28700 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC24–4–000]

Commission Information Collection Activities (FERC–725A(1C)); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of extension information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (''Commission'' or ''FERC'') is soliciting public comment on the proposed extension pf the information collection, FERC–725A(1C), Mandatory Reliability Standards for Bulk-Power System:

Reliability Standard TOP–001–5 (OMB Control No. 1902–0298).

DATES: Comments on the collection of information are due February 26, 2024.

ADDRESSES: Please submit your comments to the Commission (identified by Docket No. IC) by one of the following methods:

- *eFiling at Commission's Website: http://www.ferc.gov/docs-filing/efiling.asp;*
- *U.S. Postal Service Mail:* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.
- Effective 7/1/2020, delivery of filings other than by eFiling or the U.S. Postal Service should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Jean Sonneman may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–6362.

SUPPLEMENTARY INFORMATION:

Title: FERC–725A(1C) (Mandatory Reliability Standards for Bulk-Power System: Reliability Standard TOP–001–4).

OMB Control No.: 1902–0298.

Type of Request: Extension to the information collection, with no changes to the reporting and recordkeeping requirements.

Abstract: In a petition dated March 6, 2017, the North American Electric Reliability Corporation (''NERC'') requested Commission approval for proposed Reliability Standard TOP–001–4 (Transmission Operations). NERC stated that the proposed Reliability Standard addresses the Commission directives in Order No. 817 related to: (i) transmission operator monitoring of non-bulk electric system (''BES'') facilities; (ii) redundancy and diverse routing of transmission operator, balancing authority, and reliability coordinator data exchange capabilities; and (iii) testing of alternative or less frequently used data exchange capabilities''. In an order on April 17, 2017,[1] the implementation of Reliability Standard TOP–001–4 and the retirement of Reliability Standard TOP–001–3 was approved. Reliability Standard TOP–001–5 is the currently effective version of the standard as of April 1, 2021, at the same time Reliability Standard TOP–001–4 was retired. The Commission now seeks to extend the information collection activities associated with Reliability Standard TOP–001–5.

It is also noted that we are updating appliable entities to accurately reflect for this renewal it applies to transmission operators (TOP) and balancing authorities (BA), in the previous renewal the incorrect number of TOPs was used and we are changing it from 321 to 165.

Type of Respondents: Transmission Operators (TOP) and Balancing Authorities (BA).

Estimate of Annual Burden:[2] The Commission estimates the annual public reporting burden and cost as follows.

Information collection requirements	Number of respondents & type of entity[3] (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden hours & cost per response ($) (4)[4]	Total annual burden hours & total annual cost ($) (3) * (4) = (5)
Reporting (R10, R20, & R21), ongoing	165 (TOP)	1	165	3 hrs.; $211.65	495 hrs.; $34,922.25.
Recordkeeping, ongoing	165 (TOP)	1	165	2 hrs.; $79.12	330 hrs.; $13,054.80.
TOP Sub-Totals				5 hrs.; $290.77	825 hrs.; $47,977.05.
Reporting (R23 & R24), ongoing	98 (BA)	1	98	2 hrs.; $141.10	196 hrs.; $13,827.80.
Recordkeeping, ongoing	98 (BA)	1	98	4 hrs.; $158.24	392 hrs.; $15,507.52.
BA Sub-Totals				6hrs.; $299.34	588 hrs.; $29,335.32.
FERC–725A(1C) ongoing total					1,413 hrs.; $773,312.37

Comments: Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28701 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

[1] The Delegated Letter Order is available in the Commission's eLibrary at *https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14560616.*

[2] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 Code of Federal Regulations 1320.3.

[3] Our estimates are based on the NERC Compliance Registry of 11/14/2023, which indicates there are 165 unique entities registered as TOPs and 98 unique entities registered as BAs within the United States. One entity may be registered as having several roles.

[4] The hourly cost figures, for salary plus benefits, for the reliability standards are based on Bureau of Labor Statistics (BLS) information (at *http://www.bls.gov/oes/current/naics2_22.htm* and *https://www.bls.gov/ecec/data.htm*), as of September 2023. The data for reporting requirements are for an electrical engineer (code 17–2071): $70.55/hour ($54.83 mean hourly wage plus $15.72 hourly benefits. The data for recordkeeping requirements are for an information and record clerk (code 43–4199): $39.56/hour ($29.67 mean hourly wage plus $9.89 hourly benefits).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR24–28–000.
Applicants: Enterprise Texas Pipeline LLC.
Description: 284.123 Rate Filing: SOC Update 2024 to be effective 4/1/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5081.
Comment Date: 5 p.m. ET 1/11/24.

Docket Numbers: PR24–29–000.
Applicants: Acadian Gas Pipeline System.
Description: 284.123 Rate Filing: SOC Update 2024 to be effective 4/1/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5094.
Comment Date: 5 p.m. ET 1/11/24.

Docket Numbers: PR24–30–000.
Applicants: Enterprise Intrastate LLC.
Description: 284.123 Rate Filing: SOC Update 2024 to be effective 4/1/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5098.
Comment Date: 5 p.m. ET 1/11/24.

Docket Numbers: RP24–255–000.
Applicants: Dogwood Energy LLC, Evergy Missouri West, Inc., Evergy Kansas Central, Inc.
Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et. al. of Dogwood Energy LLC, et. al.
Filed Date: 12/18/23.
Accession Number: 20231218–5303.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: RP24–258–000.
Applicants: Alliance Pipeline L.P.
Description: 4(d) Rate Filing: Negotiated Rates—Various Jan 1 2024 Releases to be effective 1/1/2024.
Filed Date: 12/20/23.
Accession Number: 20231220–5251.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: RP24–259–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: 4(d) Rate Filing: Negotiated Rate Agreement Update (EOG 2024) to be effective 2/1/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5145.
Comment Date: 5 p.m. ET 1/2/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: PR24–11–001.
Applicants: Southern California Gas Company.
Description: 284.123(g) Rate Filing: Offshore Delivery Service Rate Revision August 2023 to be effective 8/1/2023.
Filed Date: 12/20/23.
Accession Number: 20231220–5187.
Comment Date: 5 p.m. ET 12/27/23.

Docket Numbers: RP23–917–000.
Applicants: Viking Gas Transmission Company.
Description: Report Filing: Notice of Filing to Implement EPCRA to be effective N/A.
Filed Date: 12/21/23.
Accession Number: 20231221–5192.
Comment Date: 5 p.m. ET 1/2/24.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28696 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC98–2–005; ER18–2162–004.
Applicants: Louisville Gas and Electric Company, Kentucky Utilities Company, Louisville Gas & Electric Company, Kentucky Utilities Company.
Description: Refund Report of Louisville Gas and Electric Company et al.
Filed Date: 12/18/23.
Accession Number: 20231218–5306.
Comment Date: 5 p.m. ET 1/8/24.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–60–000.
Applicants: San Juan Solar 1, LLC.
Description: San Juan Solar 1, LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.
Filed Date: 12/20/23.
Accession Number: 20231220–5266.
Comment Date: 5 p.m. ET 1/10/24.

Docket Numbers: EG24–61–000.
Applicants: SJS 1 Storage, LLC.
Description: SJS 1 Storage, LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.
Filed Date: 12/20/23.
Accession Number: 20231220–5268.
Comment Date: 5 p.m. ET 1/10/24.

Docket Numbers: EG24–62–000.
Applicants: Town Hill Energy Storage 1 LLC.
Description: Town Hill Energy Storage 1 LLC submits Notice of Self–Certification of Exempt Wholesale Generator Status.
Filed Date: 12/21/23.
Accession Number: 20231221–5097.
Comment Date: 5 p.m. ET 1/11/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER22–1525–003.
Applicants: Southwest Power Pool, Inc.
Description: Compliance filing: Settlement Compliance Filing of People's Electric in Response to Nov. 30 Order to be effective 6/1/2022.
Filed Date: 12/21/23.
Accession Number: 20231221–5056.
Comment Date: 5 p.m. ET 1/11/24.

Docket Numbers: ER23–1752–002.
Applicants: Oak Trail Solar, LLC.
Description: Tariff Amendment: Second Response to Deficiency Letter to be effective 6/30/2023.

Filed Date: 12/21/23.
Accession Number: 20231221–5040.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER23–2957–001.
Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.
Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.17(b): Origis Development (Pelham Solar + Storage) LGIA Deficiency Response to be effective 9/22/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5178.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER23–2977–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Tariff Amendment: 2023–12–21_Deficiency Response to Reliability Based Demand Curve to be effective 6/3/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5103.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER23–2979–001.
Applicants: CPV Maple Hill Solar, LLC.
Description: Compliance filing: Reactive Power Rate Schedule Compliance Filing to be effective 11/29/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5196.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–719–000.
Applicants: Database returns error. There is a problem with archive data and system. Contact Administrator.
Description: Baseline eTariff Filing: San Juan Solar 1, LLC submits tariff filing per 35.12: Application for Market-Based Rate Authority to be effective 2/19/2024.
Filed Date: 12/20/23.
Accession Number: 20231220–5254.
Comment Date: 5 p.m. ET 1/10/24.
Docket Numbers: ER24–720–000.
Applicants: SJS 1 Storage, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Rate Authority to be effective 2/19/2024.
Filed Date: 12/20/23.
Accession Number: 20231220–5256.
Comment Date: 5 p.m. ET 1/10/24.
Docket Numbers: ER24–721–000.
Applicants: Database returns error. There is a problem with archive data and system. Contact Administrator.
Description: 205(d) Rate Filing: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Amendment to ISA, Service Agreement No. 6206; Queue No. AE1–196 to be effective 2/19/2024.
Filed Date: 12/20/23.
Accession Number: 20231220–5270.
Comment Date: 5 p.m. ET 1/10/24.
Docket Numbers: ER24–722–000.
Applicants: Oklahoma Gas and Electric Company.
Description: 205(d) Rate Filing: Normal filing 2024 Jan to be effective 1/1/2024.
Filed Date: 12/20/23.
Accession Number: 20231220–5278.
Comment Date: 5 p.m. ET 1/10/24.
Docket Numbers: ER24–723–000.
Applicants: Southwest Power Pool, Inc.
Description: 205(d) Rate Filing: 4206 Tenaska Clear/WAPA Facilities Construction Agreement to be effective 2/20/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5034.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–724–000.
Applicants: Southwest Power Pool, Inc.
Description: 205(d) Rate Filing: 607R45 Evergy Kansas Central, Inc. NITSA NOA to be effective 12/1/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5136.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–725–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to 5 Service Agreements re: FirstEnergy Reorganization to be effective 12/31/9998.
Filed Date: 12/21/23.
Accession Number: 20231221–5154.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–726–000.
Applicants: Viridon New York Inc.
Description: Baseline eTariff Filing: Formula Rate Baseline to be effective 2/20/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5157.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–727–000.
Applicants: Viridon Southwest LLC.
Description: Baseline eTariff Filing: Formula Rate Baseline to be effective 2/20/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5159.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–728–000.
Applicants: Tri-State Generation and Transmission Association, Inc.
Description: Tariff Amendment: Notice of Cancellation of Service Agreement FERC No. 610 to be effective 11/25/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5167.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–729–000.
Applicants: Holyoke BESS LLC.
Description: Baseline eTariff Filing: Application for Market Based Rate Authority to be effective 12/22/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5185.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–730–000.
Applicants: Southern California Edison Company.
Description: 205(d) Rate Filing: 5th Amend CLGIA & DSA, Mesa Wind (WDT400–WDT400QFC/SA Nos. 395–396) to be effective 12/22/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5188.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–731–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 205(d) Rate Filing: 2023–12–21_SA 4163 IMPA–IN Solar 1 FSA (J1234) to be effective 2/20/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5189.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–732–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: 205(d) Rate Filing: 2023–12–21_SA 4165 IMPA–IN Solar 1 FSA (J1235) to be effective 2/20/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5191.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–733–000.
Applicants: California State University Channel Islands Site Authority.
Description: 205(d) Rate Filing: Amended Request for Schedule L–1, Expedited Consideration and Waiver to be effective 12/21/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5195.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–734–000.
Applicants: Southwest Power Pool, Inc.
Description: 205(d) Rate Filing: 1276R32 Evergy Metro NITSA NOA to be effective 12/1/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5199.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–735–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Notice of Cancellation of WMPA, SA No. 5759; Queue No. AF2–277 re: withdrawal to be effective 1/15/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5206.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–736–000.
Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Notice of Cancellation of WMPA, SA No. 5760; Queue No. AF2–278 re: withdrawal to be effective 1/15/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5209.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–737–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Notice of Cancellation of WMPA, SA No. 5761; Queue No. AF2–279 re: withdrawal to be effective 1/15/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5211.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–738–000.
Applicants: PNY BESS LLC.
Description: Baseline eTariff Filing: Application For Market Based Rate Authority to be effective 12/22/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5215.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–739–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Notice of Cancellation of WMPA, SA No. 5835; Queue No. AF2–288 re: withdrawal to be effective 1/15/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5216.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–740–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Notice of Cancellation of WMPA, SA No. 5820; Queue No. AF2–290 re: withdrawal to be effective 1/15/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5218.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–741–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to 5 Service Agreements re: FirstEnergy Reorganization to be effective 12/31/9998.
Filed Date: 12/21/23.
Accession Number: 20231221–5219.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–742–000.
Applicants: Duke Energy Business Services LLC, PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Duke Energy Business Services LLC submits tariff filing per 35.13(a)(2)(iii: Duke submits Amended Interconnection Agreement, Service Agreement No. 3132 to be effective 11/29/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5221.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–743–000.
Applicants: New York State Electric & Gas Corporation, New York Independent System Operator, Inc.
Description: 205(d) Rate Filing: New York State Electric & Gas Corporation submits tariff filing per 35.13(a)(2)(iii: NYISO–NYSEG Joint 205: Amended EPCA with Ticonderoga Solar, National Grid SA2764 to be effective 12/11/2023.
Filed Date: 12/21/23.
Accession Number: 20231221–5235.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–744–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Notice of Cancellation of WMPA, SA No. 6080; Queue No. AF2–274 re: withdrawal to be effective 2/20/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5238.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–745–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Midcontinent Independent System Operator, Inc. Request for Approval of Recovery of Charges in Accordance with Schedule 34 of the Open Access Transmission, Energy and Operating Reserve Markets Tariff.
Filed Date: 12/21/23.
Accession Number: 20231221–5256.
Comment Date: 5 p.m. ET 1/11/24.
Docket Numbers: ER24–746–000.
Applicants: Arizona Public Service Company.
Description: 205(d) Rate Filing: Rate Schedule No. 217, Exhibit B.RWY to be effective 2/23/2024.
Filed Date: 12/21/23.
Accession Number: 20231221–5265.
Comment Date: 5 p.m. ET 1/11/24.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES24–19–000.
Applicants: ITC Midwest LLC.
Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of ITC Midwest LLC.
Filed Date: 12/19/23.
Accession Number: 20231219–5256.
Comment Date: 5 p.m. ET 1/9/24.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RR24–1–000.
Applicants: North American Electric Reliability Corporation.
Description: North American Electric Reliability Corporation submits Petition for Approval of Revisions to the NERC Working Capital and Reserves Policy.
Filed Date: 12/21/23.
Accession Number: 20231221–5223.
Comment Date: 5 p.m. ET 1/11/24.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov*.

Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28697 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–705–000]

Bazinga, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Bazinga, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 10, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28699 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. UL19–1–000; UL19–2–000]

Central Hudson Gas & Electric Corporation; Notice of Availability of Navigability Report for the Walkill River, Request for Comments, and Notice of Pending Jurisdictional Inquiry

On May 9, 2019, the Federal Energy Regulatory Commission (Commission) received a request from the U.S. Department of the Interior's Fish and Wildlife Service (FWS) for an updated jurisdictional determination for the unlicensed Sturgeon Pool and Dashville Hydroelectric Projects. The projects are located on the Wallkill River in Ulster County, New York. In response to FWS's request, Commission staff is investigating the jurisdictional status of the Sturgeon Pool Hydroelectric Project (UL19–1–000) and Dashville Hydroelectric Project (UL19–2–000).

Pursuant to section 23(b)(1) of the Federal Power Act (FPA), 16 U.S.C. 817(1), a non-Federal hydroelectric project must be licensed (unless it has a still-valid pre-1920 Federal permit) if it: (a) is located on a navigable water of the United States; (b) occupies lands or reservations of the United States; (c) utilizes surplus water or waterpower from a government dam; or (d) is located on a stream over which Congress has Commerce Clause jurisdiction, is constructed or modified on or after August 26,1935, and affects the interests of interstate of foreign commerce.

A stream is navigable under section 3(8) of the FPA if: (1) it is currently being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements, to transport persons or property in interstate or foreign commerce. Navigability under section 3(8) of the FPA is not destroyed by obstructions or disuse of many years; personal or private use may be sufficient to demonstrate the availability of the river for commercial navigation; and the seasonal floatation of logs is sufficient to determine that a river is navigable.

Commission staff previously investigated the Commission's jurisdiction over the Sturgeon Pool and Dashville Hydroelectric Projects. In 1988, staff determined that the projects were non-jurisdictional based on staff's finding that the Wallkill River was not navigable at the location of the projects.[1] Commission staff's prior finding relied primarily on historical usage of the river. FWS requests that the Commission reexamine navigability of the Wallkill River and look specifically at the river's suitability for commercial use. A stream's suitability for commercial use can be demonstrated based on its physical characteristics, as well as its actual use or suitability for use for recreational boating, if this information shows the river is suitable for the simpler types of commercial navigation.[2]

As part of the current jurisdictional review, Commission staff prepared an updated navigability report for the Wallkill River. Before deciding on the jurisdictional status of the Sturgeon Pool and Dashville Hydroelectric Projects, the Commission will accept and consider comments on the navigability report. Comments may be filed no later January 22, 2024.

This navigability report may be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket numbers, UL19–1 and UL19–2, excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659.

[1] *See Central Hudson Gas & Electric Co.,* 44 FERC ¶ 62,215 (1988) (Dashville Hydroelectric Project in Docket No. UL88–18–000); *Central Hudson Gas & Electric Co.,* 44 FERC ¶ 62,216 (1988) (Sturgeon Pool Hydroelectric Project in Docket No. UL88–22–000).

[2] *See FPL Energy Maine Hydro LLC* v. *FERC,* 287 F.3d 1151, 1158 (D.C. Cir. 2002) (affirming navigability finding based on stream characteristics and test trips by canoe).

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include Docket Numbers UL19–1–000 and/or UL19–2–000.

For further information, please contact Jennifer Polardino at (202) 502–6437 or *Jennifer.Polardino@ferc.gov*.

Dated: December 21, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28695 Filed 12–27–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2015–0436; FRL–11645–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Generic Clearance for TSCA Section 4 Test Rules, Test Orders, Enforceable Consent Agreements (ECAs), Voluntary Data Submissions, and Exemptions From Testing Requirements (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Generic Clearance for TSCA Section 4 Test Rules, Test Orders, Enforceable Consent Agreements (ECAs), Voluntary Data Submissions, and Exemptions from Testing Requirements (EPA ICR Number 1139.48, OMB Control Number 2070–0033) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2023. Public comments were previously requested via the **Federal Register** on November 2, 2021, during a 60-day comment period. This notice allows for an additional 30-days for public comments.

DATES: Comments must be received on or before January 29, 2024.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OPPT–2015–0436, to EPA online using *https://www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Katherine Sleasman, Mission Support Division (7101M), Office of Program Support, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–1204; email address: *sleasman.katherine@epa.gov.*

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR which is currently approved through December 31, 2023. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on November 2, 2021, during a 60-day comment period (86 FR 60460). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *https://www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *https://www.epa.gov/dockets.*

Abstract: The generic ICR addresses the information collection activities associated with the authorities provided to EPA under TSCA section 4 (15 U.S.C. 2603), which allows EPA to require the development of information related to chemicals to inform EPA and other federal agencies about chemical risks, which in turn will inform decision makers for purposes of prioritization, risk evaluation and risk management of those chemicals.

Respondents/affected Entities: Entities potentially affected by this ICR are manufacturers (including imports) or processors of chemical substances of mixtures, *e.g.,* entities identified by North American Industrial Classification System Codes 325 and 324.

Respondent's obligation to respond: Mandatory per 15 U.S.C. 2603.

Estimated number of respondents: 263.

Frequency of response: On occasion.

Total estimated burden: 114,561 hours (three year total). Burden is defined at 5 CFR 1320.3(b).

Total estimated costs: $27,261,789 (three year total), including $17,725,254 capital or operation and maintenance costs.

Changes in the estimates: The annual estimated labor burden associated with testing costs increased by 5,749 hours. Updates were made to reflect testing burden and labor costs for activities associated with contacting laboratories and arranging testing and sample collection. In addition, the 5,749 also accounts for the burden being merged into this ICR that is associated with activities associated with contacting laboratories and arranging testing as well as reviewing guidance documents and pre-issuance outreach for Test Orders. The estimated non-labor testing costs increased due to inflation. With the increase in testing costs as well as increases in labor and overhead costs over time, the annual costs to the industry respondents increased by $1,014,408.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2023–28663 Filed 12–27–23; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OA–2013–0320; FRL–11531–02–OA]

Revised Technical Guidance for Assessing Environmental Justice in Regulatory Analysis: Extension of Public Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: The Environmental Protection Agency (EPA) is announcing a 15-day extension of the public comment period on the draft revision of the *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* (EJ Technical Guidance). The original **Federal Register** document announcing the public comment period was published on November 15, 2023. The EPA is extending the deadline of the comment period from January 15, 2024 to January 30, 2024.

DATES: The public comment period for the notice published on November 15, 2023 (88 FR 78358) is being extended by 15 days. The EPA must receive comments on or before January 30, 2024.

ADDRESSES: To review the EJ Technical Guidance, please visit *https://www.epa.gov/environmental-economics/epa-draft-revision-technical-guidance-assessing-environmental-justice.* You may send comments, identified by Docket ID No. EPA–HQ–OA–2013–0320, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- U.S. Environmental Protection Agency, EPA Docket Center, Office of Policy, Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. EPA–HQ–OA–2013–0320. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Dr. Ann Wolverton, National Center for Environmental Economics, Office of Policy (Mail Code 1809A), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: 202–566–2278; email address: *Wolverton.ann@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No EPA–HQ–OA–2013–0320, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). Please visit *https://www.epa.gov/dockets/commenting-epa-dockets* for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

II. General Information

A. Where can I find the document?

The draft revision of the *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* is available at *https://www.epa.gov/environmental-economics/epa-draft-revision-technical-guidance-assessing-environmental-justice.*

B. What is the purpose of the document?

The *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* (Guidance) addresses the issue of how to analytically consider environmental justice in regulatory analyses. It directs EPA analysts to assess whether environmental justice concerns exist prior to the rulemaking and whether such concerns are likely to be exacerbated or mitigated for each regulatory option under consideration. The technical guidance makes recommendations designed to ensure greater consistency across EPA assessments of EJ concerns for regulatory actions. The recommendations encourage analysts to conduct the highest quality analysis feasible, recognizing that data limitations, time and resource constraints, and analytic challenges will vary by media and circumstance. They are not designed to be prescriptive and do not mandate the use of a specific approach. Updates to the technical guidance reflect advancements in the state of the science; other new peer-reviewed Agency guidance documents; and new priorities and direction related to the conduct of environmental justice analysis, including Executive Order 14096. The technical guidance builds on the EPA's experience in evaluating environmental justice as part of the rulemaking analytic process and underscores the EPA's ongoing commitment to ensuring the just treatment and meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. The technical guidance will enable the EPA to conduct better analysis of regulations which will ultimately enable the EPA to make better decisions.

C. How will my comments be used?

Public comment received on the draft revision of the *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* will be reviewed and considered for incorporation into or modification of text in the final revised draft of the Guidance. The final draft Guidance will then undergo internal EPA review and revision, and then be finalized for publication following peer review by the EPA's Science Advisory Board. An EPA Science Advisory Board (SAB) review of this document will be announced in December 2023. Information on the SAB review can be found here: *https://sab.epa.gov/ords/sab/r/sab_apex/sab/home.*

Victoria Arroyo,

Associate Administrator, Office of Policy.

[FR Doc. 2023–28598 Filed 12–27–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2040–0299; FRL–11641–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Use of Lead Free Pipes, Fittings, Fixtures, Solder and Flux for Drinking Water (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), Use of Lead Free Pipes, Fittings, Fixtures, Solder and Flux for Drinking Water (EPA ICR Number 2563.02, OMB Control Number 2040–0299) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2023. Public comments were previously requested via the **Federal Register** on July 11, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Comments may be submitted on or before January 29, 2024.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2040–0299, online using *www.regulations.gov* (our preferred method), by email to *OW-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Kevin Roland, Drinking Water Infrastructure Development Division, Office of Ground Water and Drinking Water, (4606M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–564–4588: fax number: 202–564–3755; email address: *roland.kevin@epa.gov.*

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through December 31, 2023. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on July 11, 2023 during a 60-day comment period (88 FR 44129). This notice allows for an additional 30 days of public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Abstract: The Reduction of Lead in Drinking Water Act of 2011 (RLDWA, the Act) modified the technical definition of ''lead free'' by lowering the maximum lead content of pipes, fittings, and fixtures from 8% to 0.25% and introduced greater complexity to calculating lead free by requiring that level be met based on a weighted average of wetted surfaces. The Act also created exemptions for certain plumbing products from pre-existing lead free requirements. The final rule establishes product certification requirements for products intended for potable use applications in public water systems and residential or non-residential facilities to demonstrate compliance with the lead free requirements. EPA expects that these requirements for lead content in plumbing materials used in new installations and repairs will result in fewer sources of lead in drinking water and, consequently, will reduce adverse health effects associated with exposure to lead in drinking water. Manufacturers with 10 or more employees or importers entering products purchased from or manufactured by manufacturers with 10 or more employees must demonstrate compliance with the lead free definition by obtaining third party certification by an American National Standards Institute (ANSI) accredited, third party certification body. Firms with fewer than 10 employees can use a third party certification body or self-certify that their products conform to the Safe Drinking Water Act's (SDWA) lead free requirements. This self-certification option also extends to custom fabricated products regardless of a manufacturer's number of employees. This rule imposes a burden on states to enforce the statutory provisions in SDWA Section 1417(a)(1), which cross references updated statutory definition of lead free within the meaning of SDWA Section 1417(d) according to the 2011 Reduction of Lead in Drinking Water Act and the 2013 Community Fire Safety Act.

Form Numbers: None.

Respondents/affected entities: Primacy Agencies, Manufacturers of lead-free pipes, fixtures and fittings.

Respondent's obligation to respond: Mandatory for compliance with Reduction of Lead in Drinking Water Act of 2011.

Estimated number of respondents: 2,250 (total).

Frequency of response: Annual.

Total estimated burden: 97,186 hours (per year). Burden is defined at 5 CFR 1320.03(b).

T*otal estimated cost:* $12.2 million (per year), including $7.5 million annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase of 19,349 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is a result of shifts in respondent activities required as the rule comes into full effect. Manufacturers have complied with initial requirements to conduct rule familiarization and initial product certifications and are now responsible for recertifications and recordkeeping. In the three-year period covered by this ICR, primacy agencies are responsible for developing and implementing oversight plans. These changes are considered adjustments because the parameters of this overall collection as defined by the September 2020 rule (85 FR 54235) have not been modified.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2023–28640 Filed 12–27–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2017–0300; FRL–11639–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Lead and Copper Rule Revisions (LCRR) (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Lead and Copper Rule Revisions (LCRR)'' (EPA ICR Number 2606.03, OMB Control Number 2040–0297) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the LCRR ICR, which is currently approved through December 31, 2023. Public comments were previously requested via the **Federal Register** on July 24, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

DATES: Additional comments may be submitted on or before January 29, 2024.

ADDRESSES: Submit your comments, referencing Docket ID Number EPA–HQ–OW–2017–0300, to EPA online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Amina Grant, Office of Water, Mail Code 4607M, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–564–7683; email address: *Grant.Amina@epa.gov*.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the LCRR ICR, which is currently approved through December 31, 2023. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on July 24, 2023, during a 60-day comment period (88 FR 47496). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets*.

Abstract: This ICR renewal characterizes the incremental impacts of the LCRR regarding burden and costs for the three-year period of January 1, 2024, through December 31, 2026. In addition to renewing the LCRR ICR, this request includes information on potential burden that may result if respondents follow recommendations included in EPA's SL Inventory Guidance when seeking to comply with LCRR inventory requirements over the same three-year period.

EPA intends to revise the LCRR prior to its compliance date. The proposed Lead and Copper Rule Improvements (LCRI) was published on December 6, 2023 (88 FR 84878), and EPA intends to promulgate the final LCRI by October 16, 2024, revising many rule areas of the LCRR. Additional information on the potential burden established in the proposal preamble may result from respondents following EPA's recommendations in the ''Guidance for Developing and Maintaining a Service Line Inventory'' (August 2022, EPA 816–B–22–001) (referred to as SL Inventory Guidance) when seeking to comply with the requirements of the LCRR. If the LCRI is promulgated as planned, there would be no need for water systems to implement the LCRR except for the initial inventory requirements, public education requirements for consumers served by a lead, galvanized requiring replacement, or unknown service line, and the 24-hour public notice requirement. Similarly, states are not expected to apply for or obtain primacy for the LCRR. Currently, most states have sought, or intend to seek, an extension until December 18, 2025, to obtain primacy for the LCRR. If the LCRI is promulgated as planned in 2024, that primacy deadline would no longer be applicable. For the purposes of this ICR, however, this notice includes the estimated burden and costs associated with this ICR renewal for the LCRR as well as describes what would happen without promulgation of the LCRI. It is provided for the reader to understand the information that would be collected if the LCRI is not promulgated. When EPA promulgates the LCRI, the Agency intends to issue a new ICR that would describe and assess the revised burden and costs to reflect the changed regulatory requirements of the LCRI.

Form Numbers: None.

Respondents/affected entities: Respondents include owners/operators of PWSs and primacy agencies (and the EPA Regions with primary agency responsibility).

Respondent's obligation to respond: Both mandatory (LCRR requirements) and voluntary (SL Inventory Guidance) components.

Estimated number of respondents: The number of respondents is 67,712.

Frequency of response: Once and annually, varies by activity.

Total estimated burden: 9,660,286 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $641,162,423(per year), which includes $225,456,799 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase of 8,530,946 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is primarily due to the differing ICR burden estimation windows. The previous ICR covered the first three years after the promulgation of the LCRR when PWSs and primacy agencies could have been engaged in the regulatory startup/implementation activities identified in the currently approved ICR. This ICR renewal covers these same activities from the current ICR for only the first year of the renewal period (2024). In the next two years covered by the ICR renewal (2025 and 2026), if the LCRI is not promulgated as planned in 2024, both systems and primacy agencies would work to

implement several ongoing, additional LCRR requirements.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2023–28641 Filed 12–27–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2023–0244, FRL–11642–01–OMS]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Disposal of Coal Combustion Residuals From Electric Utilities (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Disposal of Coal Combustion Residuals from Electric Utilities, EPA ICR Number 2609.03, OMB Control Number 2050–0223 to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2023. Public comments were previously requested via the **Federal Register** on May 1, 2023 during a 60-day comment period.

DATES: Additional comments may be submitted on or before January 29, 2024.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OLEM–2023–0244 to EPA either online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Peggy Vyas, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–566–0453; *vyas.peggy@epa.gov*.

SUPPLEMENTARY INFORMATION: This is a proposed extension of the ICR, which is currently approved through December 31, 2023. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public comments were previously requested via the **Federal Register** on May 1, 2023 during a 60-day comment period (88 FR 26537). This notice allows for an additional 30 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets*.

Abstract: The EPA published a final rule to regulate the disposal of coal combustion residuals (CCR) from electric utilities as solid waste under RCRA Subtitle D (see 80 FR 21302, April 17, 2015). EPA established national minimum criteria for existing and new CCR landfills and CCR surface impoundments and all lateral expansions to include location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post-closure care, and recordkeeping, notification, and internet posting requirements. Since the final rule, several court decisions have required accelerated closure timelines for many units and forced closures for many units previously categorized as lined. In 2020, EPA published the ''Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments Rule'' which allows for units to receive variances for unlined surface impoundments (see 85 FR 72506, November 12, 2020). This ICR includes the voluntary action that states may take to obtain permit program approval. With this renewal, this ICR also incorporates the burden currently covered by OMB Control No. 2050–0053.

Form Numbers: None.

Respondents/affected entities: Entities potentially affected by this action are the private sector, as well as State, Local, or Tribal Governments.

Respondent's obligation to respond: Mandatory under section 4010(c) and 3001(d)(4) of the Resource Conservation and Recovery Act (RCRA) of 1976.

Estimated number of respondents: 744 (21 states and 723 new and existing facilities).

Frequency of response: On occasion.

Total estimated burden: 173,083 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $26,168,233 per year, includes $15,511,426 annualized capital or operation & maintenance costs.

Changes in the Estimates: There is an increase of 170,904 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is mainly a result of having incorporated the burden associated with the information collection requirements related to the disposal of CCR from existing ICR 2050–0053 into this ICR.

Courtney Kerwin,

Director, Information Engagement Division.

[FR Doc. 2023–28639 Filed 12–27–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1214; FR ID 192754]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the

quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before February 26, 2024. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

OMB Control Number: 3060–1214.

Title: Direct Access to Numbers Order, FCC 15–70, Conditions.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 20 respondents; 20 responses.

Estimated Time per Response: 10–35 hours.

Frequency of Response: One-time; ongoing and bi-annual reporting requirements.

Obligation to Respond: Voluntary. Statutory authority for these collections are contained in 47 U.S.C. 251(e)(1) and section 6(a) of the TRACED Act.

Total Annual Burden: 1,100 hours.

Total Annual Cost: No Cost.

Needs and Uses: On June 18, 2015, the Commission adopted a Report and Order establishing the Numbering Authorization Application, which allows interconnected VoIP providers to apply for a blanket authorization from the FCC that, once granted, will allow them to demonstrate that they have the authority to provide service in specific areas, thus enabling them to request numbers directly from the Numbering Administrators. The collection covers the information and certifications that applicants must submit in order to comply with the Numbering Authorization Application process. On September 21, 2023, the Commission adopted a Second Report and Order that strengthens this application process by revising this information collection to ensure the Commission receives sufficient detail from interconnected VoIP applicants to make informed, public-interest-driven decisions about their direct access applications and thereby protect the public from bad actors. This information will continue help the Commission stem the tide of illegal robocalls, protect national security and law enforcement, safeguard the nation's finite numbering resources, reduce the opportunity for regulatory arbitrage, and further promote public safety.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–28621 Filed 12–27–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, 800 North Capitol Street, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**, and the Commission requests that comments be submitted within 7 days on agreements that request expedited review. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 201414.

Agreement Name: ONE/HMM WIN Slot Charter Agreement.

Parties: Ocean Network Express Pte. Ltd. and MM Co., Ltd.

Filing Party: Joshua Stein; Cozen O'Connor.

Synopsis: The Agreement authorizes ONE to charter space to HMM in the trade between the U.S. East and Gulf Coasts, and the Indian Subcontinent, the Mediterranean, and the Red Sea.

Proposed Effective Date: 12/20/2023.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/84535.

Dated: December 22, 2023.

Carl Savoy,

Federal Register Alternate Liaison Officer.

[FR Doc. 2023–28642 Filed 12–27–23; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, with revision, the Single-Counterparty Credit Limits (FR 2590; OMB No. 7100–0377).

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, *nuha.elmaghrabi@frb.gov,* (202) 452–3884.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements (which contain more detailed information about the information collections and burden estimates than this notice), and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportingforms/home/review* or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

Collection title: Single-Counterparty Credit Limits.

Collection identifier: FR 2590.

OMB control number: 7100–0377.

Effective Date: June 30, 2024.

General description of collection: The FR 2590 was implemented in connection with the Board's single-counterparty credit limits rule (SCCL rule),[1] codified in the Board's Regulation YY—Enhanced Prudential Standards (12 CFR part 252) [2] and the Board's Regulation LL—Savings and Loan Holding Companies (12 CFR part 238).[3]

The information collected by the FR 2590 reporting form allows the Board to monitor a covered company's or a covered foreign entity's compliance with the SCCL rule. In addition to the reporting form, the FR 2590 information collection incorporates notice requirements pertaining to requests that may be made by a covered company or covered foreign entity to request temporary relief from specific requirements of the SCCL rule, as well as a requirement that filers of the FR 2590 reporting form retain an exact copy of each completed FR 2590.

Frequency: Quarterly, event-generated.

Respondents: Covered company or covered foreign entity. A covered company is any U.S. bank holding company that is subject to Category I, II, or III standards or any savings and loan holding company that is subject to Category II or III standards. A covered foreign entity is a foreign banking organization (FBO) that is subject to Category II or III standards or that has total global consolidated assets of $250 billion or more, and any U.S. intermediate holding company that is subject to Category II or III standards.

Total estimated number of respondents: 83.

Estimated average hours per response:

Reporting FR 2590 Form: 170.56.

Reporting Requests for temporary relief: 10.

Recordkeeping: 0.25.

Total estimated change in burden: 0.

Total estimated annual burden hours: 56,719.[4]

Current actions: On September 11, 2023, the Board published a notice in the **Federal Register** (88 FR 62364) requesting public comment for 60 days on the extension, with revision, of the FR 2590. The Board proposed to revise the FR 2590 reporting form to clarify that an FBO that meets the large exposure standards on a consolidated basis established by its home-country supervisor is not required to provide additional documentation as part of its FR 2590 submission. The Board also proposed to clarify that a respondent should use tier 1 capital data and total consolidated assets data that is concurrent with its FR 2590 submission when calculating and reporting compliance with the SCCL rule. The Board also proposed to clarify that respondents should retain manually signed and attested copies of the cover page of the FR 2590 form and of the data submitted for three years, in accordance with similar requirements for other regulatory reports. The Board also proposed to clarify that the order of counterparties should be the same across Schedules G–1 through G–4, Schedules M–1 through M–2, and the Summary of Net Credit Exposures. Finally, the Board proposed to revise Schedule M–1 by adding an additional table for firms calculating derivative transaction exposures using the standardized approach for counterparty credit risk to report collateral received in connection with those derivative transactions. The comment period for this notice expired on November 13, 2023. The Board did not receive any comments relevant to the revision of this collection or to the PRA. The revisions will be implemented as proposed.

Board of Governors of the Federal Reserve System, December 22, 2023.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–28683 Filed 12–27–23; 8:45 am]

BILLING CODE 6210–01–P

[1] 83 FR 38460 (August 6, 2018). See also 84 FR 59032 (November 1, 2019) (finalizing the SCCL rule for Savings and Loan Holding Companies).

[2] See 12 CFR part 252, subparts H and Q.

[3] See 12 CFR part 238, subpart Q.

[4] More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at *https://www.federalreserve.gov/apps/reportingforms/home/review.* On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR 2590.

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than January 12, 2024.

A. Federal Reserve Bank of St. Louis (Holly A. Rieser, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Christy Jones, Kevin Jones, and the Franklin D. & Donna L. Lewis Trust dtd 06/21/2004, Franklin D. Lewis and Donna L. Lewis as co-trustees, all of Marshfield, Missouri; Nathan Lewis, Liberty, Missouri; Thomas Lewis, Wentzville, Missouri; William R. Lewis, and Sue Ann Lewis, both of Lebanon, Missouri;* as a group acting in concert, to retain voting shares of Cornerstone Bancshares, Inc., and thereby indirectly retain voting shares of Heritage Bank of the Ozarks, both of Lebanon, Missouri.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–28666 Filed 12–27–23; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice–MRB–2023–07; Docket No. 2023–0002; Sequence No. 47]

GSA Acquisition Policy Federal Advisory Committee; Notification of Upcoming Web-Based Public Meeting

AGENCY: Office of Government-wide Policy (OGP), General Services Administration (GSA).

ACTION: Meeting notice.

SUMMARY: Notice of these Web-based subcommittee meetings is being provided in accordance with GSA's Federal Advisory Committee Management Program regulations. This notice provides the updated schedule for a series of Web-based meetings for three subcommittees of the GSA Acquisition Policy Federal Advisory Committee (GAP FAC): the Acquisition Workforce Subcommittee, the Industry Partnerships Subcommittee, and the Policy and Practice Subcommittee. These subcommittee meetings are open to the public. Information on attending and providing written public comment is under the **SUPPLEMENTARY INFORMATION** section.

DATES: The three Subcommittees will hold recurring Web-based meetings 3 p.m. to 5 p.m., eastern standard time (EST)on the following dates:

Acquisition workforce subcommittee	Industry partnerships subcommittee	Policy and practice subcommittee
1/22/24	1/23/24	1/25/24
2/23/24	2/20/24	2/22/24
3/18/24	3/19/24	3/21/24
4/15/24	4/16/24	4/18/24

ADDRESSES: The meetings will be accessible via webcast. Registrants will receive the webcast information before the meeting.

FOR FURTHER INFORMATION CONTACT: Boris Arratia, Designated Federal Officer, Office of Government-wide Policy, 703–795–0816, or email: *boris.arratia@gsa.gov;* or Stephanie Hardison, Office of Government-wide Policy, 202–258–6823, or email: *stephanie.hardison@gsa.gov.* Additional *information about* the subcommittees and the Committee, including meeting materials and agendas, will be available on-line at *https://gsa.gov/policy-regulations/policy/acquisition-policy/gsa-acquisition-policy-federal-advisory-committee.*

SUPPLEMENTARY INFORMATION:

Background

The GAP FAC serves as an advisory body to GSA's Administrator on how GSA can use its acquisition tools and authorities to target the highest priority Federal acquisition challenges. To accomplish its work, the GAP FAC established three subcommittees: Policy and Practices, Industry Partnerships, and Acquisition Workforce.

The Policy and Practice Subcommittee will focus on procurement policy that supports robust climate and sustainability action. This group will focus on regulatory, policy, and process changes required to embed climate and sustainability considerations in Federal acquisitions.

The Industry Partnerships Subcommittee will investigate ways to expand a climate focus on Federal acquisition while reinforcing inclusion, domestic sourcing, small business opportunity, and innovation from an Industry standpoint. This includes identifying and addressing gaps in sustainable attributes standards for the goods and services that the Federal government buys.

The Acquisition Workforce Subcommittee will explore ways to advance a culture of sustainability and climate action within the acquisition workforce. This includes equipping and enabling the acquisition workforce to effectively use sustainability as a critical element in the evaluation and source selection process.

The frequency of meetings for the three subcommittees is every four weeks to give committee members additional time to reflect on the information being provided by guest speakers. The previous notice can be found here: *https://www.federalregister.gov/documents/2023/11/06/2023-24432/gsa-acquisition-policy-federal-advisory-committee-notification-of-upcoming-web-based-public-meeting.*

Purpose of the Meetings

The purpose of these web-based meetings is for the subcommittees to develop recommendations for submission to the full Committee. The Committee will, in turn, deliberate on the subcommittees recommendations and decide whether to proceed with formal advice to GSA based upon them.

Meeting Agenda

- Opening Remarks
- Subject Matter Experts Presentations
- Subcommittee Member Discussions
- Closing Remarks and Adjourn

Meeting Registration

The subcommittee meetings are open to the public and will be accessible by webcast. All public attendees will need to register to obtain the meeting webcast information. Registration information is located on the GAP FAC website: *https://www.gsa.gov/policy-regulations/policy/acquisition-policy/gsa-acquisition-policy-federal-advisory-committee.* All registrants will be asked to provide their name, affiliation, and email address. After registration, individuals will receive webcast access information via email.

Public Comments

Written public comments are being accepted via email at *gapfac@gsa.gov.* To submit a written public comment, please email at *gapfac.gsa.gov* and include your name, organization name (if applicable), and include ''GAPFAC–2022–0001'' on any attached document(s) (if applicable).

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2023–28668 Filed 12–27–23; 8:45 am]

BILLING CODE 6820–RV–P

GOVERNMENT ACCOUNTABILITY OFFICE

Notice of Planned Methodology for Estimating Lump Sum Catch-Up Payments to Eligible 1983 Beirut Barracks Bombing Victims and 1996 Khobar Towers Bombing Victims; Request for Comment

AGENCY: Government Accountability Office (GAO).

ACTION: Notice of planned methodology for estimating lump sum catch-up payments; request for comment.

SUMMARY: GAO is now accepting comments on our notice of planned methodology for estimating potential lump sum catch-up payments to certain 1983 Beirut Barracks bombing victims and certain 1996 Khobar Towers bombing victims who have submitted eligible claims for payment to the United States Victims of State Sponsored Terrorism Fund. We invite comments on all aspects of the planned methodologies proposed in this notice. GAO is publishing this notice pursuant to of the requirements of the Fairness For 9/11 Families Act (Fairness Act). Comments should be sent to the email address below.

DATES: Interested persons are invited to submit comments on or before January 28, 2024.

ADDRESSES: Submit comments to *FundPaymentComments@gao.gov* or by U.S. mail to Ms. Triana McNeil at 441 G Street NW, Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: David Lutter, at (202) 512–7500 or *LutterD@gao.gov* if you need additional information. For general information, contact GAO's Office of Public Affairs, 202–512–4800.

SUPPLEMENTARY INFORMATION: Pursuant to sec. 101 of Fairness For 9/11 Families Act (Fairness Act), GAO is publishing this notice of estimated potential lump

sum catch-up payments to certain 1983 Beirut Barracks bombing victims and certain 1996 Khobar Towers bombing victims who have submitted eligible claims to the United States Victims of State Sponsored Terrorism Fund (Fund), on or after December 29, 2022, and by June 27, 2023.[1]

For purposes of the Fund, the term ''claim'' generally refers to a claim based on compensatory damages awarded to a United States person in a final judgment.[2] These judgments are issued by a United States district court under state or federal law against a foreign state that has been designated a state sponsor of terrorism and arising from acts of international terrorism.[3] In general, a claim is determined eligible for payment from the Fund if the Special Master determines that the judgment holder (referred to as a ''claimant'') is a United States person, that the claim at issue meets the definition of claim above, and that the claim was submitted timely.[4] All decisions made by the Special Master with regard to compensation from the Fund are final and not subject to administrative or judicial review.[5] As of January 2023, the Fund has allocated to all eligible claimants approximately $3.4 billion in four payment rounds, which were authorized in 2017, 2019, 2020, and 2023. The Fund was established in 2015 by the Justice for United States Victims of State Sponsored Terrorism Act (Victims Act).[6] At the time of enactment, the Victims Act allowed plaintiffs in two identified lawsuits, *In Re 650 Fifth Avenue and Related Properties* and *Peterson* v. *Islamic Republic of Iran* (*Peterson*)[7] to elect to participate in the Fund and assign any and all rights, title, and interest in the actions for the purposes of participating in the Fund.[8] Plaintiffs in these actions who did not elect to participate in the Fund were also permitted to submit an application for conditional payment from the Fund in which initial payment amounts would be determined and set aside, pending a final determination in these actions.[9] In the event that a final judgment was entered in favor of the plaintiffs in the actions and funds were distributed, the payments allocated to claimants who applied for a conditional payment were to be considered void, and any funds previously allocated to such conditional payments be made available and distributed to all other eligible claimants.[10] A final judgment in favor of plaintiffs in *Peterson* was entered, appealed to the United States Court of Appeals for the Second Circuit, and ultimately affirmed by the United States Supreme Court on April 20, 2016.[11] Distributions to the judgment creditor plaintiffs in *Peterson* commenced on October 19, 2016.[12] Accordingly, conditional claimants who were judgment creditors in *Peterson* did not receive award payments, and the Fund did not include them in award calculations in 2017 for the first round of payments or subsequent payment rounds.[13] These conditional claimants include 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims.

The Victims Act outlines minimum payment requirements in which any applicant with an eligible claim who has received, or is entitled or scheduled to receive, any payment that is equal to, or in excess of, 30 percent of the total compensatory damages owed on the applicant's claim from any source other than the Fund[14] shall not receive any payment from the Fund until all other eligible applicants have received from the Fund an amount equal to 30 percent of the compensatory damages awarded to those applicants pursuant to their final judgments.[15] The Fairness Act amended the Victims Act to provide that the minimum payment requirements include the total amount received by applicants who are 1983 Beirut Barracks bombing victims or 1996 Khobar Towers bombing victims as a result of or in connection with *Peterson* or *In Re 650 Fifth Avenue and Related Properties.*[16] It further provides that any such applicant who has received or is entitled or scheduled to receive 30 percent or more of such applicant's compensatory damages judgment as a result of or in connection with such proceedings shall not receive any payment from the Fund, except as consistent with minimum payment requirements or as part of a lump sum catch-up payment under section 101 of the Fairness Act.[17]

Section 101 of the Fairness Act contains a provision for GAO to conduct an audit and publish a notice estimating potential lump sum catch-up payments for 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims who submitted eligible applications to the Fund on or after December 29, 2022, and by June 27, 2023.[18] This section also established a lump sum catch-up payment reserve fund within the Fund and appropriated

[1] Public Law 117–328, div. MM, 136 Stat. 4459, 6106–6111 (classified as amended at 34 U.S.C. 20144(d)(4)(D)). Other 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims have applied to and been determined eligible for payment from the Fund in prior rounds. Section 101 directs us to estimate catch-up payments for those who submitted eligible claims to the Fund between the date of enactment (December 29, 2022), and June 27, 2023, which is the date the application period closed for catch-up payments. In general, the deadline for submitting a claim to the Fund is not later than 90 days after obtaining a final judgment. However, the Fairness Act reopened the application period for 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims awarded final judgments before December 29, 2022, providing that these victims had 180 days from the date of enactment of the Fairness Act (June 27, 2023) to submit an application for payment to the Fund. 34 U.S.C. 20144(c)(3)(A)(ii).

[2] 34 U.S.C. 20144(c)(2).

[3] 34 U.S.C. 20144(c)(2).

[4] 34 U.S.C. 20144(c)(1).

[5] *See* 34 U.S.C. 20144(b)(3). Although not subject to administrative or judicial review, a claimant whose claim is denied in whole or in part by the Special Master may request a hearing before the Special Master not later than 30 days after receipt of a written decision. Id. 20144(b)(4). Not later than 90 days after any such hearing, the Special Master must issue a final written decision affirming or amending the original decision, and that written decision is final and nonreviewable. Id.

[6] Public Law 114–113, div. O, tit. IV, sec. 404, 129 Stat. 2242, 3007–3017 (classified as amended at 34 U.S.C. 20144(d)(4)(C)).

[7] *In Re 650 Fifth Avenue and Related Properties,* No. 08 Civ. 10934 (S.D.N.Y. filed Dec. 17, 2008) and *Peterson* v. *Islamic Republic of Iran,* No. 10 Civ. 4518 (S.D.N.Y.).

[8] Public Law 114–113, 129 Stat. at 3013.

[9] Public Law 114–113, 129 Stat. at 3013–14.

[10] Id. at 3014. In the event of an adverse final judgment in *Peterson* or *In Re 650 Fifth Avenue and Related Properties,* the Special Master was to release a portion of an eligible claimant's conditional payment to such eligible claimant if the Special Master anticipates that such claimant will receive less than the amount of the conditional payment from any proceeds from the final judgment that is entered in favor of the plaintiffs. Id. Such portion shall not exceed the difference between the amount of the conditional payment and the amount the Special Master anticipates such claimant will receive from the proceeds. Id.

[11] *See Bank Markazi aka Central Bank of Iran* v. *Peterson,* 578 U.S. 212 (2016); U.S. Victims of State Sponsored Terrorism Fund, ''Supplemental Report from the Special Master,'' at 6 (August 2017).

[12] U.S. Victims of State Sponsored Terrorism Fund, ''Supplemental Report from the Special Master,'' at 6 (August 2017).

[13] Id. There were 78 conditional claimants who were *Peterson* judgment creditors who fell into this category. Id.

[14] Claimants are required to provide the Special Master with information regarding compensation from any source other than this Fund that the claimant (or, in the case of a personal representative, the victim's beneficiaries) has received or is entitled or scheduled to receive as a result of the act of international terrorism that gave rise to a claimant's final judgment, including information identifying the amount, nature, and source of such compensation. 34 U.S.C. 20144(b)(2)(B).

[15] 34 U.S.C. 20144(d)(3)(B)(i).

[16] 34 U.S.C. 20144(d)(3)(B)(iii).

[17] 34 U.S.C. 20144(d)(3)(B)(iii).

[18] 34 U.S.C. 20144(d)(4)(D)(i). As discussed in footnote 1, section 101 directs us to estimate catch-up payments for those who submitted eligible claims to the Fund between the date of enactment (December 29, 2022), and June 27, 2023, which is the date the application period closed for catch-up payments. See 34 U.S.C. 20144(c)(3)(A)(ii).

$3 billion to this reserve fund.[19] Specifically, we are publishing for comment our methodology for estimating lump sum catch-up payments for eligible 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims in ''amounts that, after receiving the lump sum catch-up payments, would result in the percentage of the claims of such victims received from the Fund being equal to the percentage of the claims of non-9/11 victims of state sponsored terrorism received from the Fund, as of the date of enactment.'' [20] For the purposes of this analysis and consistent with the Fairness Act, ''1983 Beirut Barracks bombing victim'' means ''a plaintiff, or estate or successor in interest thereof, who has an eligible claim to the Fund that arises out of the October 23, 1983, bombing of the United States Marine Corps Barracks in Beirut, Lebanon, and includes a plaintiff, estate, or successor in interest who is a judgment creditor in *Peterson* v. *Islamic Republic of Iran* or a settling judgment creditor as identified in the order dated May 27, 2014, in *In Re 650 Fifth Avenue & Related Properties.*'' [21] The term ''1996 Khobar Towers bombing victim'' means ''a plaintiff, or estate or successor in interest thereof, who has an eligible claim to the Fund that arises out of the June 25, 1996 bombing of the Khobar Tower housing complex in Saudi Arabia, and includes a plaintiff, estate, or successor in interest who is a judgment creditor in *Peterson* v. *Islamic Republic of Iran* or a settling judgment creditor as identified in the order dated May 27, 2014, in *In Re 650 Fifth Avenue & Related Properties.*'' [22]

[19] 34 U.S.C. 20144(d)(4)(D)(iv). The Fairness Act directed the Special Master to authorize lump sum catch-up payments to 9/11 victims, spouses and dependents in amounts equal to those previously estimated by GAO. GAO, *U.S. Victims of State Sponsored Terrorism Fund: Estimated Lump Sum Catch-Up Payments,* GAO–21–105306 (Aug. 11, 2021). Additionally, not earlier than 90 days and not later than 1 year after submission of the report that is to follow this notice the Special Master is to authorize lump sum catch-up payments from the reserve fund in amounts equal to those estimated by GAO. 34 U.S.C. 20144(d)(4)(D)(iv)(II).

[20] 34 U.S.C. 20144(d)(4)(D)(i). Further, section 101 provides for GAO to conduct this audit in accordance with 34 U.S.C. 20144(d)(3)(A), which generally requires that distributions be made on a pro rata basis and also places limits on the amount of eligible claims (referred to as ''statutory caps''). For example, for individuals, the cap is $20,000,000 and for claims of non-9/11 family members when aggregated, the cap is $35,000,000. As such, we plan to use data from the Fund, to the extent available, on the claim amounts after the application of statutory caps.

[21] 34 U.S.C. 20144(j)(15).

[22] 34 U.S.C. 20144(j)(16).

Methodology To Produce Estimates for Lump Sum Catch-Up Payments

To estimate the amount(s) called for in section 101, GAO will utilize data from the Fund on the following amounts: (1) payments from the Fund received by non-9/11 claimants in the first through fourth payment rounds; [23] (2) net eligible claims [24] of these non-9/11 claimants in the first through fourth payment rounds; (3) net eligible claims [25] of the 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims who were deemed eligible by the Fund and applied between December 29, 2022, and June 27, 2023; [26] and (4) compensation from other sources [27] received by the 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims who were deemed eligible by the Fund and applied between December 29, 2022, and June 27, 2023.

Using these data, we estimated that the amount of payments that non-9/11 claimants received, as a percentage of their net eligible claims in the first four rounds of Fund distributions, was 4.6122 percent (referred to as ''GAO percentage calculation''). To estimate GAO's payment percentage, we determined the payment amounts received by non-9/11 claimants from the Fund in the first through fourth payment rounds. Next, we determined the net eligible claims of these non-9/11 claimants in each round. We divided the amount of payments by the net eligible claims to determine GAO's percentage calculation.

Using the GAO percentage calculation, we plan to estimate two amounts for purposes of the second notice: (1) the total amount needed to provide lump sum catch-up payments to potentially eligible 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims based on these victims' net eligible claims; and (2) the total amount needed to provide lump sum catch-up payments to potentially eligible 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims based on these victims' net eligible claims offset by compensation from other sources.[28] In the data provided, 1,417 of the potentially eligible 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims have reported compensation from other sources, such as court-awarded compensation.[29]

After consideration of the comments from this notice, we will issue a second

[23] As discussed in footnote 1, this includes some 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims who applied to and received payment from the Fund in prior rounds. If claimants applied to the Fund more than once, they only appear in the data we received the first time they applied and were determined eligible. For example, the data we received show 12 claimants of the 1983 Beirut Barracks bombing or 1996 Khobar Towers bombing attacks who received a payment in round 1, 141 in round 2, 423 in round 3, and 708 in round 4.

[24] For the purposes of our analysis, ''net eligible claims'' refers to the monetary amount of all eligible claims after the application of statutory caps by the Fund, if applicable. 34 U.S.C. 20144(d)(3)(A). In accordance with GAO standards, we will assess the reliability and completeness of the data from the Fund to ensure that it is appropriate for these purposes.

[25] As of December 2023, data from the Fund on the claim amounts after the application of statutory caps (''net eligible claims'') for 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims who are potentially eligible for lump sum catch-up payments was not available. This is because these claimants have not yet been included in a payment distribution that would require the application of statutory caps by the Fund. While we have data from the Fund on compensatory damages awards, we do not yet have the data with claim amounts after the application of statutory caps. We plan to work with the Fund to generate these data and to incorporate these updated claim amounts into our analysis when available.

[26] We received data from the Fund as of December 2023 for 1,362 claimants for the 1983 Beirut barracks bombing and 159 claimants for the 1996 Khobar Towers bombing who were deemed eligible by the Fund and applied between December 29, 2022, and June 27, 2023. We also received data on 60 victims of these attacks whose eligibility for the Fund is still being determined as of November 2023. These applications are pending because the Fund is awaiting additional documentation from these individuals that is needed to determine their claims' eligibility. Some of these 1,581 claimants may be judgment creditors in *Peterson.* We also received data from the Fund on the 78 conditional claimants who are *Peterson* judgment creditors discussed in footnote 13. Because eligibility for some of these victims is still being determined, we refer to the group as a whole as ''potentially eligible'' for catch-up payments.

[27] Claimants are required to provide the Special Master with information regarding compensation from any source other than this Fund that the claimant (or, in the case of a personal representative, the victim's beneficiaries) has received or is entitled or scheduled to receive as a result of the act of international terrorism that gave rise to a claimant's final judgment, including information identifying the amount, nature, and source of such compensation. 34 U.S.C. 20144(b)(2)(B). We received data from the Fund on compensation from other sources for claimants who are potentially eligible for catch-up payments.

[28] In our prior work, we did not offset eligible 9/11 victims, spouses and dependents' net eligible claims with compensation from other sources because this population did not have qualifying compensation from other sources. Although some 9/11 claimants may have received awards from the 9/11 Victims Compensation Fund (VCF), money received from the VCF is not considered an offset for the Fund's award calculations. See U.S. Victims of State Sponsored Terrorism Fund, *Frequently Asked Questions, http://www.usvsst.com/faq.php* (last accessed Dec. 4, 2023) (see 4.8 *Updated* What is a source of compensation other than the USVSST Fund?).

[29] According to Fund data, compensation from other sources received by potentially eligible 1983 Beirut Barracks bombing victims and 1996 Khobar Towers bombing victims range from $0 to approximately $5 million.

Federal Register notice, utilizing data from the Fund to report estimated lump sum catch-up payments based on these methodologies with any changes we determine appropriate. We invite comments on all aspects of the planned methodologies proposed in this notice. After consideration of the comments from this notice, we will again seek public comment on the second **Federal Register** notice.

Authority: Pub. L. 117–328, div. MM, 136 Stat. 4459, 6106–6111 (34 U.S.C. 20144(d)(4)(D)).

Triana McNeil,

Director, Homeland Security and Justice, U.S. Government Accountability Office.

[FR Doc. 2023–28674 Filed 12–27–23; 8:45 am]

BILLING CODE 1610–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE24–034, Rigorous Evaluation of Policies for Their Impacts on the Primary Prevention of Multiple Forms of Violence; Amended Notice of Closed Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE24–034, Rigorous Evaluation of Policies for their Impacts on the Primary Prevention of Multiple Forms of Violence; February 27, 2024, 8 a.m.–5 p.m., EST, web conference, in the original **Federal Register** notice. The meeting notice was published in the **Federal Register** on October 24, 2023, Volume 88, Number 204, page 73020.

The notice is being amended to change the date to a two-day meeting and to change the times. The notice should read as follows:

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE24–034, Rigorous Evaluation of Policies for their Impacts on the Primary Prevention of Multiple Forms of Violence.

Dates: February 27–28, 2024.

Times: 8:30 a.m.–5:30 p.m., EST.

The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Carlisha Gentles, Pharm.D., B.C.P.S., C.D.C.E.S., Scientific Review Officer, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341. Telephone: (770) 488–1504; Email: *CGentles@cdc.gov*.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–28615 Filed 12–27–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE24–013, Research Grants To Identify Effective Community-Based Strategies for Overdose Prevention (R01); Amended Notice of Closed Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE24–013, Research Grants to Identify Effective Community-Based Strategies for Overdose Prevention (R01); March 12–13, 2024, 8:30 a.m.–5 p.m., EDT, web conference, in the original **Federal Register** notice. The meeting notice was published in the **Federal Register** on October 18, 2023, Volume 88, Number 200, page 71867.

The notice is being amended to change the meeting dates to a three-day meeting. The notice should read as follows:

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE24–013, Research Grants to Identify Effective Community-Based Strategies for Overdose Prevention (R01).

Dates: March 12–14, 2024.

Times: 8:30 a.m.–5 p.m., EDT.

The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Aisha L. Wilkes, M.P.H., Scientific Review Officer, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341. Telephone: (404) 639–6473; Email: *AWilkes@cdc.gov.*

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–28614 Filed 12–27–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE22–003, Rigorously Evaluating Programs and Policies To Prevent Child Sexual Abuse (CSA); Amended Notice of Closed Meeting

Notice is hereby given of a change in the meeting of the Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE22–003, Rigorously Evaluating Programs and Policies to Prevent Child Sexual Abuse (CSA); April 11, 2024, 8:30 a.m.–5 p.m., EDT, videoconference, in the original **Federal Register** notice. The meeting notice was published in the **Federal Register** on November 2, 2023, Volume 88, Number 211, page 75287.

The notice is being amended to change the start time to 10:30 a.m. The notice should read as follows:

Name of Committee: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)—CE22–003, Rigorously Evaluating Programs and Policies to Prevent Child Sexual Abuse (CSA).

Date: April 11, 2024.

Time: 10:30 a.m.–5 p.m., EDT.

The meeting is closed to the public.

FOR FURTHER INFORMATION CONTACT: Aisha L. Wilkes, M.P.H., Scientific Review Officer, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Highway NE, Mailstop S106–9, Atlanta, Georgia 30341.

Telephone: (404) 639–6473; Email: *AWilkes@cdc.gov*.

The Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–28616 Filed 12–27–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Immigration Legal Services for Afghan Arrivals—Eligible Afghan Arrivals Intake Form and Intake Interview (New Collection)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing to collect data from Eligible Afghan Arrivals (EAAs) in need of direct legal services through Immigration Legal Services for Afghan Arrivals (ILSAA) to determine eligibility.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing *infocollection@acf.hhs.gov.* Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: In August 2021, Operation Allies Welcome (OAW) was established at President Biden's direction to implement coordinated efforts across the federal government to support vulnerable Afghans, including those who worked alongside the U.S. in Afghanistan (OAW, Homeland Security (*https://www.dhs.gov/allieswelcome*)). Under the Afghanistan Supplemental Appropriations Act, 2022, and Additional Afghanistan Supplemental Appropriations Act, 2022, Congress authorized ORR to provide resettlement assistance and other benefits available to refugees to specific Afghan populations in response to their emergency evacuation and resettlement. ILSAA was established to provide immigration legal services to EAAs. The ILSAA EAA Intake Form and Intake Interview are designed to gather information about EAAs who are interested in receiving legal services through ILSAA. ILSAA staff will review the EAA's information to determine whether they meet the qualifications to receive legal services through ILSAA. This will be done on a rolling basis as EAAs seek legal services through ILSAA.

Respondents: OAW Afghan Populations.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Total number of responses per respondent	Average burden hours per response	Annual burden hours
Eligible Afghan Arrival (EAA) Intake Form	2,700	1	0.08	216
Eligible Afghan Arrival (EAA) Intake Interview	2,700	1	0.75	2,025

Estimated Total Annual Burden Hours: 2,241.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: Division C, Title III, Public Law 117–43,135 Stat. 374; Division B, Title III, Public Law 117–70, 1102 Stat. 4.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–28660 Filed 12–27–23; 8:45 am]

BILLING CODE 4184–89–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; State Health Insurance Assistance Program Annual Sub-Recipients Report OMB Control Number 0985–0070

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as

required under the Paperwork Reduction Act of 1995. This 30-day notice collects comments on the information collection requirements related to the proposed extension without change for the information collection requirements related to State Health Insurance Assistance Program Annual Sub-Recipients Report OMB Control Number 0985–0070.

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by January 29, 2024.

ADDRESSES: Submit written comments and recommendations for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. By mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Margaret Flowers, Administration for Community Living, *Margaret.Flowers@acl.hhs.gov*, (202) 795–7315.

SUPPLEMENTARY INFORMATION: In compliance with the Paperwork Reduction Act, the Administration for Community Living (ACL) has submitted the following proposed collection of information to OMB for review and clearance. This information collection gathers the amount of federal funds provided annually to each State Health Insurance Assistance Program (SHIP) sub-contractor and sub-grantee that are delivering SHIP services.

Congress requires this data collection for program monitoring of the SHIP under the Bipartisan Budget Act of 2018. Collection of this data allows ACL to communicate with Congress and the public on the SHIP network of agencies. The data collected is electronically posted on the ACL website to educate the network on who the SHIP state sub-recipients are and how much money they are receiving.

Comments in Response to the 60-Day Federal Register Notice

A 60-day FRN published in the FR on October 24, 2023, at 88 FR 73030. There were no public comments received during the 60-day FRN comment period.

Estimated Program Burden: ACL estimates the respondent burden hours to prepare and complete all reports associated with this collection of information as follows:

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Annual burden hours
	54	1	1	54
Total	54	1	1	54

Dated: December 21, 2023.

Alison Barkoff,

Principal Deputy Administrator for the Administration for Community Living, Performing the Delegable Duties of the Administrator and the Assistant Secretary for Aging.

[FR Doc. 2023–28579 Filed 12–27–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; Alzheimer's and Dementia Program Data Reporting Tool (ADP–DRT) OMB Control Number 0985–0022

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under the Paperwork Reduction Act of 1995. This 30-day notice collects comments on the information collection requirements related to the proposed revision for the Alzheimer's and Dementia Program Data Reporting Tool (ADP–DRT) OMB Control Number 0985–0022.

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by January 29, 2024.

ADDRESSES: Submit written comments and recommendations for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. By mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Erin Long, *erin.long@acl.hhs.gov,* (202) 795–7389.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, the Administration for Community Living (ACL) has submitted the following proposed collection of information to OMB for review and clearance. The Older American's Act requires that ACL evaluate demonstration projects intended to be brought to scale. It also requires prioritization of projects that address the needs of underserved populations and promote partnerships between community-based service providers.

To fulfill the evaluation requirements and allow for optimal federal and state-level management of ACL's Alzheimer's Disease Programs Initiative (ADPI), specific information must be collected from grantees. The current reporting tool is set to expire December 31, 2023. The ADPI Project Officer has reviewed the current data collection procedures to ensure the acceptability of these items as appropriate while minimizing burden for grantees. The result of this process is the proposed modifications to the existing data collection tool. ACL is aware that different grantees have different data collection capabilities. It is understood that, following the approval of the modified data collection tool, ACL will work with its grantees to offer regular training to ensure minimal burden.

This information collection collects demographic data from people receiving programs and services funded by HHS. ACL will adhere to best practices for collection of all demographic information when this information is collected for the programs listed in accordance with OMB guidance.

This includes, but is not limited to, guidance specific to the collection of sexual orientation and gender identity

(SOGI) items that align with Executive Order 13985 on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Executive Order 14075 on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, and Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation. Understanding these disparities can and should lead to improved service delivery for ACL's programs and populations served.

Comments in Response to the 60-Day Federal Register Notice

A 60-day FRN published in the FR on October 24, 2023, at 88, FR 73029–73030. ACL received one public comment during the 60-day FRN in support of ACL adhering to the collection of SOGI data.

Estimated Program Burden: ACL estimates the burden associated with this collection of information as follows:

Type of respondent	Form name	Number of respondents	Frequency of response	Average time per response (hours)	Total burden hours (annual)
Grantee	ADSSP–DRT	69	2	6.64	916.32
Total					916.32

Dated: December 21, 2023.

Alison Barkoff,

Principal Deputy Administrator for the Administration for Community Living, Performing the Delegable Duties of the Administrator and the Assistant Secretary for Aging.

[FR Doc. 2023–28578 Filed 12–27–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities: Proposed Collection; Public Comment Request; of the Performance Data for State Grants for Assistive Technology Program Annual Progress Report (OMB Control Number 0985–0042)

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) is announcing an opportunity for the public to comment on the proposed collection of information listed above. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish a notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice.

This information collection (IC) extension solicits comments on the information collection requirements relating to the Performance Data for State Grants for Assistive Technology Program Annual Progress Report (OMB Control Number 0985–0042).

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by February 26, 2024.

ADDRESSES: Submit electronic comments on the collection of information to: Rob Groenendaal (*Robert.Groenendaal@acl.hhs.gov*). Submit written comments on the collection of information to Administration for Community Living, 330 C Street SW, Washington, DC 20201, Attention: Rob Groenendaal.

FOR FURTHER INFORMATION CONTACT: Robert Groenendaal, Administration for Community Living, *Robert.Groenendaal@acl.hhs.gov,* (202) 795–7356.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3506) Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The PRA requires Federal agencies provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, ACL is publishing a notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, ACL invites comments on our burden estimates or any other aspect of this collection of information, including:

(1) whether the proposed collection of information is necessary for the proper performance of ACL's functions, including whether the information will have practical utility;

(2) the accuracy of ACL's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used to determine burden estimates;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents, including using automated collection techniques when appropriate, and other forms of information technology.

The Assistive Technology Act of 1998 (AT Act) (29 U.S.C. 3003) authorizes grants to public agencies in the 50 states and the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianas (states and outlying areas). With these funds, states and outlying areas operate ''Statewide AT Programs'' that conduct activities to increase access to and acquisition of assistive technology (AT) for individuals with disabilities and older Americans. As a condition of receiving a grant to support their Statewide AT Programs, the states and outlying areas must provide to ACL an application and annual progress reports on their activities.

Applications: The application required of states and outlying areas is a three-year State Plan for Assistive Technology (State Plan for AT or State Plan) (OMB No. 0985–0048). The content of the State Plan for AT is based on the requirements in 29 U.S.C. 3003(d).

Annual Reports: In addition to submitting a State Plan, every three years, states and outlying areas are required to submit annual progress reports on their activities. The data required in that progress report is specified at 29 U.S.C. 3003(f).

National aggregation of data related to measurable goals is necessary for the Government Performance and Results Act (31 U.S.C. 1115) as well as an Annual Report to Congress. Therefore, this data collection instrument provides a way for all 56 grantees—50 U.S. states, DC, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands to collect and report data on their performance in a consistent manner, including a uniform survey to be given to consumers. This uniform survey is included as part of the data collection package.

The AT Act (29 U.S.C. 3006(d)) requires that ACL submit to Congress an annual report on the activities conducted under the Act and an analysis of the progress of the states and outlying areas in meeting their measurable goals. This report must include a compilation and summary of the data collected under Section 3003(f). In order to make this possible, states and outlying areas must provide their data uniformly. This data collection instrument was developed to ensure that all 56 states and outlying areas report data in a consistent manner in alignment with the requirements of Section 3003(f).

As stated above, ACL will use the information collected via this instrument to:

(1) Complete the annual report to Congress required by the AT Act;

(2) Comply with reporting requirements under the Government Performance and Results Act; and

(3) Assess the progress of states and outlying areas regarding measurable goals.

Data collected from the grantees will provide a national description of activities funded under the AT Act to increase the access to and acquisition of AT devices and services through statewide AT programs for individuals with disabilities and older adults. Data collected from grantees will also provide information for usage by Congress, the Department, and the public. In addition, ACL will use this data to inform program management, monitoring, and technical assistance efforts. States will be able to use the data for internal management and program improvement.

The proposed data collection tools may be found on the ACL website for review at: *https://www.acl.gov/about-acl/public-input.*

Estimated Program Burden: ACL estimates the burden of this collection of information as follows. This information collection has three pieces:

(A) A web-based system that collects data from states and outlying areas. The 56 grantees report to ACL using the web-based data collection system. A workgroup of grantees estimated that the average amount of time required to complete all responses to the data collection instrument is 80 hours annually. The estimated response burden includes time to review the instructions, gather existing data, and complete and review the data entries. These estimates are based on the experience of staff who implement these programs at the state level. In addition, ACL projects that clean-up and clarification of data elements will require no change in data burden estimates.

(B) A performance measurement survey that states and outlying areas collect from individuals. The 56 grantees ask consumers to complete surveys that provide information on their performance related to the state's measurable goals. Historical data from states indicates that the average state will ask for this information from 3,242 consumers at one minute per consumer to complete the question survey, for a total of 54 hours annually.

(C) A customer satisfaction survey that states and outlying areas collect from individuals. The 56 grantees also ask consumers to complete customer satisfaction surveys. Historical data from states indicated that the average state asks for this information from 3,242 consumers at one minute per consumer, for a total of 54 annual burden hours.

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Annual burden hours
Work-Based System	56	1	80	4,480
Performance Management	56	1	54	3,024
Customer Satisfaction	56	1	54	3,024
Program Support	56	1	208	11,648
Record Keeping Burden	56	1	8	448
Total			404	22,624

Dated: December 21, 2023.

Alison Barkoff,

Principal Deputy Administrator for the Administration for Community Living, performing the delegable duties of the Administrator and the Assistant Secretary for Aging.

[FR Doc. 2023–28626 Filed 12–27–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; Title VI Program Performance Report (OMB Control Number 0985–0007)

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under the Paperwork Reduction Act of 1995. This 30-day notice collects comments on the information collection requirements related to the Title VI Program Performance Report (OMB Control Number 0985–0007).

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by January 29, 2024.

ADDRESSES: Submit written comments and recommendations for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or

by using the search function. By mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Delaney Roach, Administration for Community Living, *evaluation@acl.hhs.gov,* (202) 795–7316.

SUPPLEMENTARY INFORMATION: In compliance with the Paperwork Reduction Act, the Administration for Community Living (ACL) has submitted the following proposed collection of information to OMB for review and clearance. A Program Performance Report on activities under title VI of the Older Americans Act (OAA) is necessary for ACL to monitor Federal funds effectively and to be informed as to the progress of the programs. Grantees are required to submit an annual Program Performance Report to allow for efficient Federal monitoring.

The OAA states that the tribal organization (applicant) for a grant under title VI part A, Indian Program, report data for ACL to comply with requirements under the OAA. The OAA also states that an applicant under title VI part B, Native Hawaiian Program, provide that the organization will report information for the agency Assistant Secretary to reasonably require, and comply with such requirements. An applicant for a grant under title VI part C, Native American Caregiver Support Program must also prepare and submit reports on the data and records, including information on the services funded by ACL. A combined Program Performance Report form is used for reporting by grantees under Parts A, B and C. The regulations require grantees to submit annual performance reports unless ACL requires quarterly or semiannual reports.

The Program Performance Report provides a data base for ACL to: (1) monitor program achievement of performance objectives; (2) establish program policy and direction; and (3) prepare responses to Congress, the OMB, other Federal departments, and public and private agencies as required by the OAA. If ACL did not collect the program data herein requested, it would not be able to monitor and manage total program progress as expected, nor develop program policy options directed toward assuring the most effective use of limited title VI funds.

Comments in Response to the 60-Day Federal Register Notice

A 60-day FRN published in the FR on October 25, 2023, at 88 FR 73344–73345. ACL did not receive any public comments during the 60-day FRN public comment period.

Estimated Program Burden: The burden estimate is specific to the type of work done by the grantees that use this reporting format; ACL estimates it takes 3.5 hours to complete the title VI PPR. With 282 respondents taking 3.5 hours per performance report, annual burden hour totals 987 hours.

Respondent/data collection activity	Number of respondents	Responses per respondent	Hours per response	Annual burden hours
Title VI PPR	282	1	3.5	987
Total				987

Dated: December 21, 2023.

Alison Barkoff,

Principal Deputy Administrator for the Administration for Community Living, performing the delegable duties of the Administrator and the Assistant Secretary for Aging

[FR Doc. 2023–28577 Filed 12–27–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; State Health Insurance Assistance Program (SHIP) Client Contact Forms OMB Control Number 0985–0040

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under the Paperwork Reduction Act of 1995. This 30-day notice collects comments on the information collection requirements related to the proposed revision for the information collection requirements related to the State Health Insurance Assistance Program (SHIP) Client Contact Forms OMB Control Number 0985–0040.

DATES: Comments on the collection of information must be submitted electronically by 11:59 p.m. (EST) or postmarked by January 29, 2024.

ADDRESSES: Submit written comments and recommendations for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. By mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Katherine Glendening, Administration for Community Living, *Katherine.Glendening@acl.hhs.gov,* (202) 795–7350.

SUPPLEMENTARY INFORMATION: In compliance with the Paperwork Reduction Act (44 U.S.C. 3507), the Administration for Community Living (ACL) has submitted the following proposed collection of information to OMB for review and clearance. The purpose of this data collection is to collect performance data from grantees, grantee team members and partners. Congress requires this data collection for program monitoring and Government Performance Results Act (GPRA) (31 U.S.C. 1115) purposes. This data collection allows ACL to communicate with Congress and the public on the SHIP, the Senior Medicare Patrol (SMP) program, and the Medicare Improvements for Patients & Providers Act (MIPPA) program, in addition to the SHIP Data Performance Reports and Information Collection under OMB 0985–0040. The SHIP, SMP, and MIPPA programs are in each of the 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. To ensure that grantees report activity accurately and consistently it is imperative that these data collection tools remain active. The respondents for

this data collection are grantees, grantee team members, and partners who meet with Medicare beneficiaries and older adults in-group settings and in one-on-one sessions to educate them on Medicare enrollment, Medicare benefits and subsidy programs, the importance of being aware of Medicare fraud, error, and abuse, and having the knowledge to protect the Medicare system.

Authorizing Legislation: The Omnibus Budget Reconciliation Act of 1990 created the State Health Insurance Assistance Program (SHIP) (U.S.C. 1395b–4) and requires the Secretary to provide a series of reports to the U.S. Congress on the performance of the SHIP program annually. The law also requires ACL to report on the program's impact on beneficiaries and to obtain important feedback from beneficiaries. This tool captures the information and data necessary for ACL to meet these Congressional requirements, as well as, capturing performance data on individual grantees providing ACL with essential insight for monitoring and technical assistance purposes. In addition, MIPPA (42 U.S.C. 1935b–3 notes), provided targeted funding for the SHIPs, area agencies on aging, and Aging and Disability Resource Centers to conduct enrollment assistance to Medicare beneficiaries for the Limited Income Subsidy and Medicare Savings Program. These activities have been funded nearly annually through a series of funding or extenders bills. This tool also collects performance and outcome data on the MIPPA Program providing ACL necessary information for monitoring and oversight.

Under Public Law 104–208, the Omnibus Consolidated Appropriations Act of 1997, Congress established the Senior Medicare Patrol Projects to further curb losses to the Medicare program. The Senate Committee noted that retired professionals, with appropriate training, could serve as educators and resources to assist Medicare beneficiaries and others to detect and report errors, fraud, and abuse.

Among other requirements, it directed ACL to work with the Department of Health and Human Services, Office of Inspector General (HHS/OIG) and the Government Accountability Office (GAO), to assess the performance of the program. ACL employs this tool to collect performance and outcome data on the SMP Program, necessary information for monitoring and oversight. ACL has shared this data and worked with HHS/OIG to develop SMP performance measures.

The HHS/OIG has collected SMP performance data and issued SMP performance reports since 1997. The information from the current collection is reported by the HHS/OIG to Congress and the public. This information is also used by ACL as the primary method for monitoring the SMP Projects.

This data collection will also support ACL in tracking performance outcomes and efficiency measures with respect to annual and long-term performance targets established in the GPRA.

This information collection collects demographic data from people receiving programs and services funded by ACL. ACL will adhere to best practices for collection of all demographic information when this information is collected for the programs listed in accordance with OMB guidance.

This includes, but is not limited to, guidance specific to the collection of sexual orientation and gender identity (SOGI) items that align with Executive Order 13985 on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Executive Order 14075 on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, and Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation. Understanding these disparities can and should lead to improved service delivery for ACL's programs and populations served.

Comments in Response to the 60-Day Federal Register Notice

ACL published a 60-day FRN on October 25, 2023, at 88 FR 73345. ACL did not receive any public comments during the 60-day FRN.

Estimated Program Burden: ACL estimates the respondent burden hours to prepare and complete all reports associated with this collection as 329,294 annual burden hours. This estimate is based on the current data system's aggregate data and reports. Modifying several forms, ACL has reduced the overall burden hours associated with this information collection along with grantees no longer generating reports outside of the data system.

Form name	Estimated time in minutes	Fraction of an hour
SMP Media Outreach & Education	4	0.0667
SMP Group Outreach & Education	4	0.0667
SMP Individual Interaction	5	0.0833
SMP Team Member Activity	5	0.0833
SMP Interaction	5	0.0833
SMP Team Member	7	0.1166
SHIP Media Outreach & Education	4	0.0667
SHIP Group Outreach & Education	4	0.0667
SHIP Team Member	7	0.1166
SHIP Beneficiary Contact	5	0.0833
SHIP Training Form	6	0.10
SHIP Team Member Activity	7	0.1166
SHIP Training	4	0.0667

Estimated Annualized Burden Hours

Grantee respondent type	Form/report name	Number of respondents	Number of responses per respondent	Average burden per response (in minutes)	Total burden hours
SMP	Media Outreach & Education	216	46	4	662.4
SMP	Group Outreach & Education	6,935	4	4	1,849.33

Grantee respondent type	Form/report name	Number of respondents	Number of responses per respondent	Average burden per response (in minutes)	Total burden hours
SMP	Individual Interaction	6,935	41	5	23,694.58
SMP	Team Member	216	31	5	558
SMP	SIRS Team Member Activity	216	31	5	558
*SMP	OIG Report	*0	0	0	0
*SMP	Time Spent Report	*0	0	0	0
SHIP/MIPPA	Media Outreach & Education	3,750	15	4	3,750
SHIP/MIPPA	Group Outreach & Education	3,750	15	4	3,750
SHIP/MIPPA	STARS Team Member	216	75	5	1,350
SHIP/MIPPA	Beneficiary Contact	15,000	233	5	291,250
*SHIP/MIPPA	SHIP Performance Report	*0	0	0	0
*SHIP/MIPPA	Resource Report	*0	0	0	0
*SHIP/MIPPA	MIPPA Performance Report	*0	0	0	0
SHIP/MIPPA	SHIP Team Member Activity	216	40	7	1,008
SHIP/MIPPA	Team Member Training	216	40	6	864
*SHIP/SMP/MIPPA	Summary Reports	*0	0	0	0
*SHIP/MIPPA	Part D Enrollment Outcomes Report	*0	0	0	0
Totals		37,666	571		329,294.31

*This data collection activity is an automated task in the system and does not compute to an estimate of time for burden.

Dated: December 21, 2023.

Alison Barkoff,

Principal Deputy Administrator for the Administration for Community Living, performing the delegable duties of the Administrator and the Assistant Secretary for Aging.

[FR Doc. 2023–28623 Filed 12–27–23; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–5408]

Reformulating Drug Products That Contain Carbomers Manufactured With Benzene; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry entitled ''Reformulating Drug Products That Contain Carbomers Manufactured With Benzene.'' The purpose of this guidance is to provide recommendations to applicants and manufacturers on what tests should be performed and what documentation should be submitted or available to support the reformulation of drug products that use carbomers manufactured with benzene. Certain United States Pharmacopeia (USP) carbomer monographs currently allow for unacceptable levels of benzene, which raises safety concerns. FDA has requested that the USP omit (or remove) these monographs, and applicants and manufacturers may need to reformulate their drug products to avoid use of these carbomers. This guidance provides recommendations for tests and documentation related to reformulation based on various routes of administration and dosage forms of affected drug products, and provides recommendations for application holders on the appropriate submission types to notify the Agency of reformulation changes. The intended effect of this guidance is to, as appropriate, provide a less burdensome risk-based approach to reformulation submissions relative to existing guidances on scale-up and post-approval changes (SUPAC), and address the immediate public health need to expedite the discontinuation of the use of carbomers manufactured with high levels of benzene in drug products.

DATES: The announcement of the guidance is published in the **Federal Register** on December 28, 2023.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–D–5408 for ''Reformulating Drug Products That Contain Carbomers Manufactured With Benzene; Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Pallavi Nithyanandan, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 4156, Silver Spring, MD 20993–0002, 301–796–7546, *Pallavi.Nithyanandan@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Reformulating Drug Products That Contain Carbomers Manufactured With Benzene.'' FDA is issuing this guidance consistent with its good guidance practices (GGP) regulation (§ 10.115 (21 CFR 10.115)). The Agency is implementing this guidance without prior public comment because it has determined that prior public participation is not feasible or appropriate (§ 10.115(g)(2) and (3)). FDA made this determination because benzene is a known human carcinogen, and the Agency seeks to facilitate the transition away from using carbomers manufactured with high levels of benzene. Publishing this guidance without prior public comment addresses the immediate public health need to expedite the discontinuation of the use of these carbomers and provides a less burdensome risk-based approach to applicant submissions, relative to existing guidances on SUPAC. Although this guidance document is immediately in effect, it remains subject to comment in accordance with FDA's GGP regulation.

The purpose of this guidance is to provide recommendations to applicants and manufacturers on what tests should be performed and what documentation should be submitted or available to support the reformulation of drug products that use carbomers manufactured with benzene. Certain USP carbomer monographs currently allow for unacceptable levels of benzene, which raises safety concerns. FDA has requested that the USP omit (or remove) these monographs, and applicants and manufacturers may need to reformulate their drug products to avoid use of these carbomers.

Carbomers are a group of polymers composed of acrylic acid. They are widely used as inactive ingredients in drug products as fillers, emulsifiers, gelling agents, and binding agents. There are carbomers currently used as inactive ingredients that are manufactured using benzene as a polymerization solvent. Benzene is a known human carcinogen. As such, both the International Conference for Harmonisation (ICH) guidance for industry entitled ''Q3C—Tables and List'' (available at *https://www.fda.gov/media/133650/download*) and USP General Chapter <467> ''Residual Solvents'' designate benzene as a Class 1 solvent (*i.e.,* solvents that should be avoided) and recommend that benzene should not be employed in the manufacture of drug substances, excipients, and drug products. However, there are still several grades of carbomers that are manufactured using benzene as a solvent being used in pharmaceutical products even though alternative grades of carbomers are available that are manufactured without the use of benzene.

At the time of publication, carbomers manufactured with benzene may fall under the United States Pharmacopeia-National Formulary (USP–NF) monographs Carbomer 934, Carbomer 934P, Carbomer 940, Carbomer 941, or Carbomer 1342. These monographs permit benzene levels as high as 5,000 parts per million (ppm), which is significantly higher than the limit of 2 ppm on benzene as an impurity in the USP–NF Carbomer Homopolymer, Carbomer Copolymer, and Carbomer Interpolymer monographs. To avoid confusion, and because of the safety concerns associated with these unacceptable levels of benzene permitted by these monographs, FDA has asked the USP to remove (or ''omit'') the Carbomer 934P, Carbomer 940, Carbomer 934, Carbomer 1342, and Carbomer 941 monographs from the USP–NF compendium.

The guidance represents the current thinking of FDA on ''Reformulating Drug Products That Contain Carbomers Manufactured With Benzene.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in 21 CFR part 314 pertaining to the submission of new drug applications have been approved under OMB control number 0910–0001. The collections of information in 21 CFR parts 210 and 211 pertaining to current good manufacturing practice requirements have been approved under OMB control number 0910–0139.

III. Electronic Access

Persons with access to the internet may obtain the guidance at *https://www.fda.gov/drugs/guidance-*

compliance-regulatory-information/guidances-drugs, https://www.fda.gov/regulatory-information/search-fda-guidance-documents, or *https://www.regulations.gov.*

Dated: December 21, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–28675 Filed 12–27–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–N–0039]

Electronic Submissions; Update to the Specifications for Preparing and Submitting Postmarket Individual Case Safety Reports for Vaccines; Technical Specification

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) Center for Biologics Evaluation and Research (CBER) is announcing the availability of version 2.3 of the Specifications for Preparing and Submitting Postmarket Individual Case Safety Reports (ICSRS) for Vaccines (Specifications). The version update is not applicable to CBER-regulated drug products marketed for human use with approved New Drug Applications (NDAs) and Abbreviated New Drug Applications (ANDAs); CBER-regulated therapeutic biological products marketed for human use with approved Biologic License Applications (BLAs); Whole Blood or blood components; and human cells, tissues, and cellular and tissue-based products (HCT/Ps) regulated solely under the Public Health Service Act.

ADDRESSES: You may submit either electronic or written comments at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security Number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2021–N–0039 for ''Electronic Submissions; Update to the Specifications for Preparing and Submitting Postmarket Individual Case Safety Reports for Vaccines; Technical Specification''. Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure laws. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Victoria Wagman, Center for Biologics Evaluation and Research, Food and Drug Administration, Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

Background

CBER is announcing the availability of version 2.3 of the Specifications for Preparing and Submitting Postmarket ICSRs for Vaccines (available at *https://www.fda.gov/industry/about-esg/cber-vaccine-icsr-implementation*). The version update has been prepared to provide updated specifications on submitting re-challenge information, to correct values for the 'Vaccination Facility Type' (FDA.G.k.4.r.14.8), and to record modifications to the 'Attachment File Name' (FDA.C.1.6.1.r.3) as well as various document formatting refinements. In addition, version 2.3 includes updated business rules (Appendix I of the Specifications) which provide details on data field specifications. The version update is not applicable to CBER-regulated drug products marketed for human use with approved NDAs and ANDAs; CBER-regulated therapeutic biological products marketed for human use with approved BLAs; Whole Blood or blood components; and HCT/Ps regulated solely under section 361 of the Public Health Service Act (42 U.S.C. 264).

At this time, all existing eVAERS submitters (vaccine manufacturers and others responsible for reporting ICSRs for vaccines) have successfully transitioned to reporting in version 2.2.

All eVAERS submitters are expected to transition from version 2.2 to the current version 2.3 as soon as possible.

Additional information about electronically submitting postmarket individual case safety reports (ICSRs) for vaccines to VAERS is available at *https://www.fda.gov/industry/about-esg/cber-vaccine-icsr-implementation.*

Dated: December 21, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–28594 Filed 12–27–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–4177]

Quality Considerations for Topical Ophthalmic Drug Products; Revised Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a revised draft guidance for industry entitled ''Quality Considerations for Topical Ophthalmic Drug Products.'' This revised draft guidance discusses certain quality considerations for ophthalmic drug products (*i.e.,* gels, ointments, creams, and liquid formulations such as solutions, suspensions, and emulsions) intended for topical delivery in and around the eye. Specifically, this revised draft guidance discusses microbiological considerations; approaches to evaluating visible particulate matter, extractables and leachables, and impurities and degradation products; use of in vitro drug release/dissolution testing as an optional quality control strategy for certain ophthalmic dosage forms; recommendations for design and delivery and dispensing features of container closure systems; and recommendations for stability studies. The revised draft guidance applies to marketed products including ophthalmic drug products approved under new drug applications (NDAs), abbreviated new drug applications (ANDAs), and biologics license applications (BLAs), as well as to over-the-counter (OTC) monograph drugs, drugs compounded by outsourcing facilities, and the drug or biological product constituent part of a combination product. This guidance revises the draft guidance for industry of the same name issued in October 2023.

DATES: Submit either electronic or written comments on the revised draft guidance by February 26, 2024 to ensure that the Agency considers your comment on this revised draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–D–4177 for ''Quality Considerations for Topical Ophthalmic Drug Products.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the revised draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the revised draft guidance document.

FOR FURTHER INFORMATION CONTACT: Ranjani Prabhakara, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 6648, Silver Spring, MD 20993–0002, 240–402–4652.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a revised draft guidance for industry entitled ''Quality Considerations for Topical Ophthalmic Drug Products.'' This revised draft guidance provides information regarding quality considerations for ophthalmic drug products consistent with the requirements outlined in section 501(a)(2)(B) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 351(a)(2)(B)) and 21 CFR parts 210 and 211 for all drug products, 21 CFR part 601 for biological products, 21 CFR part 4 for combination products, and, for ophthalmic drug products with a U.S. Pharmacopeia (USP) monograph, the applicable criteria from the USP. The revised draft guidance also provides recommendations to industry on the documentation that should be submitted in the chemistry, manufacturing, and controls (CMC) section of NDAs, ANDAs, and BLAs for certain CMC attributes for ophthalmic drug products.

This revised draft guidance revises the guidance of the same name published on October 13, 2023 (88 FR 70997). FDA is revising this draft guidance to address microbiological considerations related to product sterility for all ophthalmic drug products subject to current good manufacturing practice (CGMP) requirements and the prevention of contamination of ophthalmic drug products packaged in multidose containers, given several recent recalls of ophthalmic drug products and instances of consumer injury and death from microbiologically contaminated ophthalmic drug products.

FDA is also revising the draft guidance to clarify its stated scope. As originally published, the scope explicitly included NDA, ANDA, and BLA products regulated by the Center for Drug Evaluation and Research; OTC monograph drugs marketed under section 505G of the FD&C Act (21 U.S.C. 355h); and combination products. It was not FDA's intention to specifically exclude products that are not marketed under an approved application or under section 505G of the FD&C Act; however, the draft guidance may have been interpreted that way. Therefore, FDA is clarifying that the guidance also applies to other drugs that, while also subject to CGMP requirements, are not marketed under a drug application, including drugs compounded by outsourcing facilities pursuant to section 503B of the FD&C Act (21 U.S.C. 353b).

This revised draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The revised draft guidance, when finalized, will represent the current thinking of FDA on ''Quality Considerations for Topical Ophthalmic Drug Products.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Previous Submission of Comments

In commenting on this revised draft guidance, you do not need to reiterate comments that you previously submitted regarding the draft guidance issued on October 13, 2023. Your previously submitted comments will still be considered. You may instead submit updates to previously submitted comments, as needed, and comments related to the new section on microbiological considerations and the clarified scope of this revised draft guidance.

III. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The collections of information in 21 CFR part 314 for NDAs and ANDAs have been approved under OMB control number 0910–0001. The collections of information in 21 CFR part 601 for BLAs have been approved under OMB control number 0910–0338. The collections of information in 21 CFR parts 210 and 211 pertaining to CGMP have been approved under OMB control number 0910–0139. The collections of information in 21 CFR 201.56 and 201.57 relating to certain prescription product labeling requirements have been approved under OMB control number 0910–0572. The collections of information for section 351(k) submission of the Public Health Service Act (42 U.S.C. 262(k)) have been approved under OMB control number 0910–0718. The collections of information pertaining to human drug compounding under section 503B of the FD&C Act have been approved under OMB control number 0910–0858.

IV. Electronic Access

Persons with access to the internet may obtain the revised draft guidance at *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: December 21, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–28595 Filed 12–27–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–D–4299]

Potency Assurance for Cellular and Gene Therapy Products; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing the availability of a draft guidance entitled ''Potency Assurance for Cellular and Gene Therapy Products.'' FDA is issuing this draft guidance to provide recommendations to help assure the potency of human cellular therapy or gene therapy (CGT) products at all stages of the product lifecycle. FDA is recommending a comprehensive approach to potency assurance of CGT products that is grounded in quality risk management. For investigational products, we describe how to progressively implement a strategy for potency assurance during product development and provide additional considerations to help assure the potency of products that are undergoing rapid clinical development. For licensed products, we describe requirements for potency assurance, including testing required for lot release.

DATES: Submit either electronic or written comments on the draft guidance by March 27, 2024 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–D–4299 for ''Potency Assurance for Cellular and Gene Therapy Products.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Myrna Hanna, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Potency Assurance for Cellular and Gene Therapy Products.'' FDA is issuing this draft guidance to provide recommendations to help assure the potency of human CGT products that are regulated as biological products under section 351 of the Public Health Service Act (42 U.S.C. 262).

In this draft guidance, we provide recommendations for developing a science- and risk-based strategy to help assure the potency of human CGT products. A potency assurance strategy is a multifaceted approach that reduces risks to the potency of a product through: (1) manufacturing process design, (2) manufacturing process control, (3) material control, (4) in-process testing, and (5) potency lot release assays. The goal of a potency assurance strategy is to ensure that every lot of a product released will have the specific ability or capacity to achieve the intended therapeutic effect.

In this draft guidance, we emphasize that potency assays and their corresponding acceptance criteria should be designed to make meaningful contributions to potency assurance by reducing risks to product potency. We provide illustrative examples of approaches to potency assay development that are grounded in quality risk management. Due to the diversity of CGT products and the product-specific nature of potency assays, the recommendations in this draft guidance regarding the selection and design of potency assays are necessarily general.

This draft guidance, when finalized, is intended to supersede the document entitled ''Guidance for Industry: Potency Tests for Cellular and Gene Therapy Products,'' dated January 2011.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on potency assurance for cellular and gene therapy products. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). The collections of information in 21 CFR part 211 have been approved under OMB control number 0910–0139; the collections of information in 21 CFR 312.23 have been

approved under OMB control number 0910–0014; the collections of information in 21 CFR 600.14 have been approved under OMB control number 0910–0458; and the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances, http://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.regulations.gov.*

Dated: December 21, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–28596 Filed 12–27–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Advanced Nursing Education Program Specific Form OMB No. 0915–0375—Revision

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than February 26, 2024.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Joella Roland, the HRSA Information Collection Clearance Officer, at (301) 443–3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Advanced Nursing Education (ANE) Program Specific Form OMB No. 0915–0375—Revision

Abstract: HRSA provides advanced nursing education grants to educational institutions to increase the supply, distribution, quality of, and access to advanced education nurses through the ANE Programs. The ANE Programs are authorized by section 811 of the Public Health Service Act (42 U.S.C. 296j), as amended. This clearance request is for continued approval of the information collection OMB No. 0915–0375 with revisions. This revision request seeks to add the Advanced Nursing Education-Nurse Practitioner Residency and Fellowship (ANE–NPRF) Program and the Maternity Care Nursing Workforce Expansion Program to the ANE Program Specific Form, and to remove programs that have closed, which include the Advanced Nursing Education-Nurse Practitioner Residency (ANE–NPR) Program and the Advanced Nursing Education-Nurse Practitioner Residency Integration Program. The activities previously supported under the ANE–NPR and the Advanced Nursing Education-Nurse Practitioner Residency Integration Program are now supported under the ANE–NPRF Program.

Need and Proposed Use of the Information: Section 811 of the Public Health Service Act provides the Secretary of Health and Human Services with the authority to award grants to and enter into contracts with eligible entities to meet the costs of: (1) projects that support the enhancement of advanced nursing education and practice; and (2) traineeships for individuals in advanced nursing education programs. Under this section, HRSA makes awards to entities who train and support nurses characterized as ''advanced education nurses.'' In awarding such grants, funding preference is given to applicants with projects that will substantially benefit rural or underserved populations or help meet public health nursing needs in state or local health departments; special consideration is given to an eligible entity that agrees to extend the award to train advanced education nurses who will practice in designated Health Professional Shortage Areas.

The ANE Program Specific Form allows HRSA to effectively target funding and measure the impact of the ANE Programs in meeting the legislative intent and program goals of supporting the enhancement of advanced nursing education and creating opportunities for individuals in advanced nursing education programs to increase the number of advanced practice nurses, especially in rural and underserved areas. Additionally, collecting this data assists HRSA in carrying out the most impactful program and ensuring resources are used responsibly. The proposed updates to this information collection are to accurately list the current ANE Programs.

Likely Respondents: Likely respondents will be current ANE Programs awardees and new applicants to ANE Programs.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name (includes the ANE program specific tables and attachments)	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Advanced Nursing Education Workforce	156	1	156	7	1,092
Nurse Anesthetist Traineeship	64	1	64	7	448

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Form name (includes the ANE program specific tables and attachments)	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Advanced Nursing Education Sexual Assault Nurse Examiners	54	1	54	7	378
ANE–NPRF	64	1	64	7	448
Maternity Care Nursing Workforce Expansion	10	1	10	7	70
Total	348		348		2,436

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–28664 Filed 12–27–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[OMHA–2302–N]

Medicare Program; Administrative Law Judge Hearing Program for Medicare Claim and Entitlement Appeals; Quarterly Listing of Program Issuances—July Through September 2023

AGENCY: Office of Medicare Hearings and Appeals (OMHA), HHS.

ACTION: Notice.

SUMMARY: This quarterly notice lists the OMHA Case Processing Manual (OCPM) instructions that were published from July through September 2023. This manual standardizes the day-to-day procedures for carrying out adjudicative functions, in accordance with applicable statutes, regulations, and OMHA directives, and gives OMHA staff direction for processing appeals at the OMHA level of adjudication.

FOR FURTHER INFORMATION CONTACT: Jon Dorman, by telephone at (571) 457–7220, or by email at *jon.dorman@hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Medicare Hearings and Appeals (OMHA), a staff division within the Office of the Secretary within the U.S. Department of Health and Human Services (HHS), administers the nationwide Administrative Law Judge hearing program for Medicare claim; organization, coverage, and at-risk determination; and entitlement appeals under sections 1869, 1155, 1876(c)(5)(B), 1852(g)(5), and 1860D–4(h) of the Social Security Act (the Act). OMHA ensures that Medicare beneficiaries and the providers and suppliers that furnish items or services to Medicare beneficiaries, as well as Medicare Advantage organizations (MAOs), Medicaid State agencies, and applicable plans, have a fair and impartial forum to address disagreements with Medicare coverage and payment determinations made by Medicare contractors, MAOs, or Part D plan sponsors (PDPSs), and determinations related to Medicare eligibility and entitlement, Part B late enrollment penalty, and income-related monthly adjustment amounts (IRMAA) made by the Social Security Administration (SSA).

The Medicare claim, organization determination, coverage determination, and at-risk determination appeals processes consist of four levels of administrative review, and a fifth level of review with the Federal district courts after administrative remedies under HHS regulations have been exhausted. The first two levels of review are administered by the Centers for Medicare & Medicaid Services (CMS) and conducted by Medicare contractors for claim appeals, by MAOs and an Independent Review Entity (IRE) for Part C organization determination appeals, or by PDPSs and an IRE for Part D coverage determination and at-risk determination appeals. The third level of review is administered by OMHA and conducted by Administrative Law Judges and attorney adjudicators. The fourth level of review is administered by the HHS Departmental Appeals Board (DAB) and conducted by the Medicare Appeals Council (Council). In addition, OMHA and the DAB administer the second and third levels of appeal, respectively, for Medicare eligibility, entitlement, Part B late enrollment penalty, and IRMAA reconsiderations made by SSA; a fourth level of review with the Federal district courts is available after administrative remedies within SSA and HHS have been exhausted.

Sections 1869, 1155, 1876(c)(5)(B), 1852(g)(5), and 1860D–4(h) of the Act are implemented through the regulations at 42 CFR part 405 subparts I and J; part 417, subpart Q; part 422, subpart M; part 423, subparts M and U; and part 478, subpart B. As noted above, OMHA administers the nationwide Administrative Law Judge hearing program in accordance with these statutes and applicable regulations. To help ensure nationwide consistency in that effort, OMHA established a manual, the OCPM. Through the OCPM, the OMHA Chief Administrative Law Judge establishes the day-to-day procedures for carrying out adjudicative functions, in accordance with applicable statutes, regulations, and OMHA directives. The OCPM provides direction for processing appeals at the OMHA level of adjudication for Medicare Part A and B claims; Part C organization determinations; Part D coverage determinations and at-risk determinations; and SSA eligibility and entitlement, Part B late enrollment penalty, and IRMAA determinations.

Section 1871(c) of the Act requires that the Secretary publish a list of all Medicare manual instructions, interpretive rules, statements of policy, and guidelines of general applicability not issued as regulations at least every three months in the **Federal Register**.

II. Format for the Quarterly Issuance Notices

This quarterly notice provides the specific updates to the OCPM that have occurred in the three-month period of July through September 2023. A hyperlink to the available chapters on the OMHA website is provided below. The OMHA website contains the most current, up-to-date chapters and revisions to chapters, and will be

available earlier than we publish our quarterly notice. We believe the OMHA website provides more timely access to the current OCPM chapters for those involved in the Medicare claim; organization, coverage, and at-risk determination; and entitlement appeals processes. We also believe the website offers the public a more convenient tool for real time access to current OCPM provisions. In addition, OMHA has a listserv to which the public can subscribe to receive notification of certain updates to the OMHA website, including when new or revised OCPM chapters are posted. If accessing the OMHA website proves to be difficult, the contact person listed above can provide the information.

III. How To Use the Notice

This notice lists the OCPM chapters and subjects published during the quarter covered by the notice so the reader may determine whether any are of particular interest. The OCPM can be accessed at *https://www.hhs.gov/about/agencies/omha/the-appeals-process/case-processing-manual/index.html.*

IV. OCPM Releases for July Through September 2023

The OCPM is used by OMHA adjudicators and staff to administer the OMHA program. It offers day-to-day operating instructions, policies, and procedures based on statutes and regulations, and OMHA directives.

The following is a list and description of OCPM provisions that were issued or revised in the three-month period of July through September 2023. This information is available on our website at *https://www.hhs.gov/about/agencies/omha/the-appeals-process/case-processing-manual/index.html.*

OCPM Chapter 20 (Post-Adjudication Actions) Updates

OMHA issued the initial version of this chapter on May 25, 2018, and included it in a quarterly notice published in the August 7, 2018 **Federal Register** (83 FR 38700). The revised chapter addresses changes to post-adjudication appeals processing resulting from increased electronic case processing through OMHA's Electronic Case Adjudication and Processing Environment (ECAPE), advances in appeal filing procedures through the e-Appeal Portal, and other improvements in appeals operations and processing. This revision removes outdated data entry processes that were updated with electronic case processing. This revision also clarifies how post-adjudication actions are processed if the original adjudicator is not available for more than 20 calendar days; clarifies how various post-adjudication requests are filed; updates the operational process to re-establish an appeal. Finally, the revision adds a new section, 20.13, Requests to Obtain Approval of a Fee, which incorporates information previously included in OCPM Chapter 5. OMHA made revisions in the following sections: 20.2.1, 20.2.2, 20.3.2, 20.3.4, 20.4.1, 20.4.3, 20.4.4, 20.4.5, 20.4.6, 20.5.2, 20.5.3, 20.5.4, 20.5.5 (multiple), 20.5.7 (multiple), 20.5.8 (multiple), 20.6.1 (multiple), 20.6.2, 20.6.4, 20.6.5 (multiple), 20.6.6.1, 20.6.7 (multiple), 20.7.1.4, 20.7.2, 20.7.4, 20.7.5 (multiple), 20.7.7 (multiple), 20.8.1.3, 20.8.2, 20.8.4, 20.8.5 (multiple), 20.8.6.1, 20.8.7 (multiple), 20.9.1, 20.9.2, 20.9.4, 20.9.5, 20.10.2, 20.10.3, 20.11.2, 20.11.4, 20.11.5, 20.11.6, 20.12.1, 20.12 (multiple), 20.13.

Karen W. Ames,

Executive Director of Operations, Office of Medicare Hearings and Appeals.

[FR Doc. 2023–28625 Filed 12–27–23; 8:45 am]

BILLING CODE 4150–46–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Funding Opportunity for the Tribal Management Grant Program

Announcement Type: New.

Funding Announcement Number: HHS–2024–IHS–TMD–0001.

Assistance Listing (Catalog of Federal Domestic Assistance or CFDA) Number: 93.228.

Key Dates

Application Deadline Date: March 14, 2024.

Earliest Anticipated Start Date: June 1, 2024.

I. Funding Opportunity Description

Statutory Authority

The Indian Health Service (IHS) is accepting applications for grants for the Tribal Management Grant (TMG) Program. This program is authorized under the Snyder Act, 25 U.S.C. 13; the Transfer Act, 42 U.S.C. 2001(a); and the Indian Self-Determination and Education Assistance Act (ISDEAA), Public Law 93–638, as amended, 25 U.S.C. 5322(b)(2) and 25 U.S.C. 5322(e). The Assistance Listings section of SAM.gov (*https://sam.gov/content/home*) describes this program under 93.228.

Background

The TMG Program is a competitive grant program that is capacity building and developmental in nature and has been available for federally recognized Indian Tribes and Tribal Organizations (T/TO) since shortly after enactment of the ISDEAA in 1975. The TMG Program was established to assist T/TOs to prepare for assuming all or part of existing IHS programs, functions, services, and activities (PFSAs) and further develop and improve Tribal health management capabilities. The TMG Program provides competitive grants to T/TOs to establish goals and performance measures for current health programs, assess current management capacity to determine if new components are appropriate, analyze programs to determine if a T/TO's management is practicable, and develop infrastructure systems to manage or organize PFSAs.

Purpose

The purpose of this program is to enhance and develop health management infrastructure and assist T/TOs in assuming all or part of existing IHS PFSAs through a title I ISDEAA contract and assist established title I ISDEAA contractors and title V ISDEAA compactors to further develop and improve management capability. In addition, Tribal Management Grants are available to T/TOs under the authority of 25 U.S.C. 5322(e) for the following:

1. Obtaining technical assistance from providers designated by the T/TO (including T/TOs that operate mature contracts) for the purposes of program planning and evaluation, including the development of any management systems necessary for contract management, and the development of cost allocation plans for indirect cost rates.

2. Planning, designing, monitoring, and evaluating Federal programs serving T/TOs, including Federal administrative functions.

II. Award Information

Funding Instrument—Grant

Estimated Funds Available

The total funding identified for fiscal year (FY) 2024 is approximately $2,464,000. Individual award amounts for the first budget year are anticipated to be between $50,000 and $150,000. The funding available for competing and subsequent continuation awards issued under this announcement is subject to the availability of appropriations and budgetary priorities of the Agency. The IHS is under no

obligation to make awards that are selected for funding under this announcement.

Anticipated Number of Awards

Approximately 14–16 awards will be issued under this program announcement.

Period of Performance

The Tribal Management Grant (TMG Project) period of performance varies based on the project type selected. Period of performance is from 1 to 3 years. Please see the next section for additional details.

Eligible TMG Project Types, Maximum Funding Levels, and Periods of Performance

The TMG Program consists of four project types:

1. Feasibility study.
2. Planning.
3. Evaluation study.
4. Health management structure.

Applicants may submit applications for one project type only. An application must state the project type selected. Any application that addresses more than one project type will be considered ineligible and will not be reviewed. The maximum funding levels noted must include both direct and indirect costs. Application budgets may not exceed the maximum funding level or period of performance identified for a project type. Any application with a budget or period of performance that exceeds the maximum funding level or period of performance will be considered ineligible and will not be reviewed. Please refer to Section IV.5, ''Funding Restrictions,'' for further information regarding ineligible project activities.

1. FEASIBILITY STUDY (Maximum funding/project period: $70,000/12 months). A feasibility study must include a study of a specific IHS program or segment of a program to determine if Tribal management of the program is possible. The study shall present the planned approach, training, and resources required to assume Tribal management of the program. The study must include the following four components:

- Health needs and health care service assessments that identify existing health care services and delivery systems, program divisibility issues, health status indicators, unmet needs, volume projections, and demand analysis.
- Management analysis of existing management structures, proposed management structures, implementation plans and requirements, and personnel staffing requirements and recruitment barriers.
- Financial analysis of historical trends data, financial projections, new resource requirements for program management costs, and analysis of potential revenues from Federal/non-Federal sources.
- Decision statement/report that incorporates findings (sustainability, etc.), conclusions, and recommendations. The study and recommendations report will be presented to the Tribal governing body for determination regarding whether Tribal program assumption is desirable or warranted.

2. PLANNING (Maximum funding/project period: $50,000/12 months). Planning projects involve data collection to establish goals and performance measures for health programs operation or anticipated PFSAs under a title I contract. Planning projects will specify the design of health programs and the management systems (including appropriate policies and procedures) to accomplish the health priorities of the T/TO. For example, planning projects could include the development of a Tribe-specific health plan or a strategic health plan, etc. Please note that updated Healthy People information and Healthy People 2020 objectives are available in electronic format at *https://www.healthypeople.gov/2020/topics-objectives.* The United States (U.S.) Public Health Service encourages applicants submitting strategic health plans to address specific objectives of Healthy People 2020.

3. EVALUATION STUDY (Maximum funding/project period: $50,000/12 months). An evaluation study must include a systematic collection, analysis, and interpretation of data for the purpose of determining the impact of a program. The extent of the evaluation study could relate to the goals and objectives, policies and procedures, or programs regarding targeted groups. The evaluation study could also be used to determine the effectiveness and efficiency of a T/TO's program operations (*i.e.,* direct services, financial management, personnel, data collection and analysis, third-party billing, etc.), as well as to determine the appropriateness of new components of a T/TO's program operations that will assist efforts to improve Tribal health care delivery systems.

4. HEALTH MANAGEMENT STRUCTURE (Average funding/project period: $100,000/12 months; maximum funding/project period: $300,000/36 months). The first year funding level is limited to $150,000 for multi-year projects. The Health Management Structure component allows for implementation of systems to manage or organize PFSAs. Management structures include health department organizations, health boards, and financial management systems, including systems for accounting, personnel, third-party billing, medical records, management information systems, etc. This includes the design, improvement, and correction of management systems that address weaknesses identified through quality control measures, internal control reviews, and audit report findings under required financial audits and ISDEAA requirements.

For the minimum standards for the management systems used by a T/TO when carrying out Self-Determination contracts, please see 25 CFR part 900, Contracts Under the Indian Self-Determination and Education Assistance Act, subpart F—''Standards for Tribal or Tribal Organization Management Systems,'' 900.35—900.60. For operational provisions applicable to carrying out Self-Governance compacts, please see 42 CFR part 137, Tribal Self-Governance, Subpart I,—''Operational Provisions,'' 137.160—137.220.

III. Eligibility Information

1. Eligibility

To be eligible for this funding opportunity an applicant must be one of the following, as defined by the Indian Health Care Improvement Act (IHCIA) 25 U.S.C. 1603:

To be eligible for this funding opportunity for ''New Applicants Only,'' an applicant cannot be an existing TMG recipient under this program.

- A federally recognized Indian Tribe as defined by 25 U.S.C. 1603(14). The term ''Indian Tribe'' means any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village or group, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 *et seq.*], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
- A Tribal organization as defined by 25 U.S.C. 1603(26). The term ''Tribal organization'' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304(l)): ''Tribal organization'' means the recognized governing body of any Indian Tribe; any legally established

organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: provided that, in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the letting or making of such contract or grant. Applicant shall submit Tribal Resolutions from the Tribes to be served.

Please note that Tribes prohibited from contracting pursuant to the ISDEAA are not eligible for the TMG program. See section 424(a) of the Consolidated Appropriations Act, 2014, Public Law 113–76, as amended by section 428 of the Consolidated Appropriations Act, 2018, Public Law 115–141, section 1201 of the Consolidated Appropriations Act, 2021, Public Law 116–260, and section 445 of the Consolidated Appropriations Act, 2023, Public Law. No. 117–328.

The Division of Grants Management (DGM) will notify any applicants deemed ineligible.

2. Additional Information on Eligibility

The IHS does not fund concurrent projects. If an applicant is successful under this announcement, any subsequent applications in response to other TMG announcements from the same applicant will not be funded. Applications on behalf of individuals (including sole proprietorships) and foreign organizations are not eligible and will be disqualified from competitive review and funding under this funding opportunity.

Note: Please refer to Section IV.2 (Application and Submission Information/Subsection 2, Content and Form of Application Submission) for additional proof of applicant status documents required, such as Tribal Resolutions, proof of nonprofit status, etc.

3. Cost Sharing or Matching

The IHS does not require matching funds or cost sharing for grants or cooperative agreements.

4. Other Requirements

Applications with budget requests that exceed the highest dollar amount outlined under Section II Award Information, Estimated Funds Available, or exceed the period of performance outlined under Section II Award Information, Period of Performance, are considered not responsive and will not be reviewed. The DGM will notify the applicant.

Additional Required Documentation

Tribal Resolution

The DGM must receive an official, signed Tribal Resolution indicating support for submission of an application under this announcement prior to issuing a Notice of Award (NoA) to any Tribe or Tribal organization selected for funding. An applicant that is proposing a project affecting another Indian Tribe must include resolutions from all affected Tribes to be served. However, if an official signed Tribal Resolution cannot be submitted with the application prior to the application deadline date, a draft Tribal Resolution must be submitted with the application by the deadline date in order for the application to be considered complete and eligible for review. The draft Tribal Resolution is not in lieu of the required signed resolution but is acceptable until a signed resolution is received. If an application without a signed Tribal Resolution is selected for funding, the applicant will be contacted by the Grants Management Specialist (GMS) listed in this funding announcement and given 90 days to submit an official signed Tribal Resolution to the GMS. If the signed Tribal Resolution is not received within 90 days, the award will be forfeited.

Applicants organized with a governing structure other than a Tribal council may submit an equivalent document commensurate with their governing organization, with a statement clearly describing the alternate governing structure.

Proof of Nonprofit Status

Organizations claiming nonprofit status must submit a current copy of the 501(c)(3) Certificate with the application.

Additional Required Documentation for specific TMG Project Types

A. Federally recognized Indian Tribes applying for technical assistance and/or training grants must provide a Tribal Resolution; or a designated Tribal Organization applying on behalf of the Indian Tribe and/or Tribes it intends to serve must also provide a Tribal Resolution.

B. Documentation for Priority I participation requires a copy of the **Federal Register** notice or letter from the Bureau of Indian Affairs verifying establishment of recognized Tribal status within the past 5 years. The date on the documentation must reflect that Federal recognition was received during or after March 2016.

C. Documentation for Priority II participation requires a copy of the most current transmittal letter and Attachment A from the Department of Health and Human Services (HHS), Office of Inspector General (OIG), National External Audit Review Center (NEAR). See ''Funding Priorities'' for more information. If an applicant is unable to provide a copy of the most recent transmittal letter or needs assistance with audit issues, information or technical assistance may be obtained by contacting the IHS Office of Finance and Accounting, Division of Audit, by telephone at (301) 443–1270, or toll-free on the NEAR help line at (800) 732–0679 or (816) 426–7720. Recognized Indian Tribes or Tribal Organizations not subject to Single Audit Act requirements must provide a financial statement identifying the Federal dollars received in the footnotes. The financial statement must also identify specific weaknesses/recommendations that will be addressed in the TMG proposal and that are related to 25 CFR part 900, subpart F—''Standards for Tribal or Tribal Organization Management Systems.''

D. Documentation of Consortium participation—if an applicant is a member of an eligible intertribal consortium, the Tribe must:

1. Identify the consortium.

2. Demonstrate that the Tribe's application does not duplicate or overlap any objectives of the consortium's application.

3. Identify all consortium member Tribes.

4. Identify if any of the consortium member Tribes intend to submit a TMG application of their own.

5. Demonstrate that the consortium's application does not duplicate or overlap any objectives of other consortium members who may be submitting their own TMG application.

Funding Priorities: The IHS has established the following funding priorities for TMG awards:

- PRIORITY I—Any Indian Tribe, or Tribal Organization representing that Indian Tribe, that has received Federal recognition (including restored, funded, or unfunded) within the past 5 years, specifically received during or after March 2016, will be considered Priority I.
- PRIORITY II—T/TOs submitting a new application or a competing continuation application for the sole purpose of addressing audit material weaknesses will be considered Priority II.

Priority II participation is only applicable to the Health Management Structure project types. For more information, see ''Eligible TMG Project Types, Maximum Funding Levels, and Periods of Performance,'' in Section II.

• PRIORITY III—Eligible Direct Service and T/TOs with a title I ISDEAA contract with the IHS submitting a new application or a competing continuation application will be considered Priority III.

• PRIORITY IV—Eligible T/TOs with a title V ISDEAA compact with the IHS submitting a new application or a competing continuation application will be considered Priority IV.

The funding of approved Priority I applicants will occur before the funding of approved Priority II applicants. Priority II applicants will be funded before approved Priority III applicants. Priority III applicants will be funded before approved Priority IV applicants. Funds will be distributed until depleted.

The following definitions are applicable to the PRIORITY II category:

Audit finding—deficiencies that the auditor is required by 45 CFR 75.516 to report in the schedule of findings and questioned costs.

Material weakness—''Statements on Auditing Standards 115'' defines material weakness as a deficiency, or combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of the entity's financial statements will not be prevented, or detected and corrected on a timely basis.

Significant deficiency—''Statements on Auditing Standards 115,'' defines significant deficiency as a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

The audit findings are identified in Attachment A of the transmittal letter received from the HHS/OIG/NEAR. Please identify the material weaknesses to be addressed by underlining the item(s) listed in Attachment A.

T/TOs not subject to Single Audit Act requirements must provide a financial statement identifying the Federal dollars received in the footnotes. The financial statement should also identify specific weaknesses/recommendations that will be addressed in the TMG proposal and that are related to 25 CFR part 900 subpart F, ''Standards for Tribal and Tribal Organization Management Systems.''

Note: A decision to award a TMG does not represent a determination from the IHS regarding the T/TO's eligibility to contract for a specific PFSA under the ISDEAA. An application for a TMG does not constitute a contract proposal.

IV. Application and Submission Information

Grants.gov uses a Workspace model for accepting applications. The Workspace consists of several online forms and three forms in which to upload documents—Project Narrative, Budget Narrative, and Other Documents. Give your files brief descriptive names. The filenames are key in finding specific documents during the merit review and in processing awards. Upload all requested and optional documents individually, rather than combining them into a single file. Creating a single file creates confusion when trying to find specific documents. This can contribute to delays in processing awards, and could lead to lower scores during the merit review.

1. Obtaining Application Materials

The application package and detailed instructions for this announcement are available at *https://www.Grants.gov.*

Please direct questions regarding the application process to *DGM@ihs.gov.*

2. Content and Form Application Submission

Mandatory documents for all applications are listed below. An application is incomplete if any of the listed mandatory documents are missing. Incomplete applications will not be reviewed.

• Application forms:

1. SF–424, Application for Federal Assistance.

2. SF–424A, Budget Information—Non-Construction Programs.

3. SF–424B, Assurances—Non-Construction Programs.

4. Project Abstract Summary form.

5. Project Narrative (not to exceed 15 pages). See Section IV.2.A, Project Narrative instructions.

6. Budget Justification and Narrative (not to exceed 5 pages). See Section IV.2.B, Budget Narrative for instructions.

7. One-page Timeframe Chart.

8. Biographical sketches for all Key Personnel.

9. Certification Regarding Lobbying (GG-Lobbying Form).

The documents listed here may be required. Please read this list carefully.

• Tribal Resolution(s) as described in Section III, Eligibility.

• Letters of Support from organization's Board of Directors (if applicable).

• 501(c)(3) Certificate (if applicable).

• Disclosure of Lobbying Activities (SF–LLL), if applicant conducts reportable lobbying.

• Copy of current Negotiated Indirect Cost (IDC) rate agreement (required in order to receive IDC).

• Documentation of current Office of Management and Budget (OMB) Financial Audit (if applicable).

Acceptable forms of documentation include:

1. Email confirmation from Federal Audit Clearinghouse (FAC) that audits were submitted; or

2. Face sheets from audit reports. Applicants can find these on the FAC website at *https://facdissem.census.gov/.*

Additional documents can be uploaded as Other Attachments in *Grants.gov.* These can include:

• Work plan, logic model, and/or timeline for proposed objectives.

• Position descriptions for key staff.

• Resumes of key staff that reflect current duties.

• Consultant or contractor proposed scope of work and letter of commitment (if applicable).

• Organizational chart.

• Map of area identifying project location(s).

• Additional documents to support narrative (for example, data tables, key news articles).

Public Policy Requirements

All Federal public policies apply to IHS grants and cooperative agreements. Pursuant to 45 CFR 80.3(d), an individual shall not be deemed subjected to discrimination by reason of their exclusion from benefits limited by Federal law to individuals eligible for benefits and services from the IHS. See *https://www.hhs.gov/grants/grants/grants-policies-regulations/index.html.*

Requirements for Project and Budget Narratives

A. Project Narrative

This narrative should be a separate document that is no more than 15 pages and must: 1) have consecutively numbered pages; 2) use black font 12 points or larger (applicants may use 10 point font for tables); 3) be single-spaced; 3) be single-spaced; and 4) be formatted to fit standard letter paper (8½ x 11 inches). Do not combine this document with any others.

Be sure to succinctly answer all questions listed under the evaluation criteria (refer to Section V.1, Evaluation Criteria) and place all responses and required information in the correct section noted below or they will not be considered or scored. If the narrative exceeds the overall page limit, the application will be considered not responsive and will not be reviewed.

The 15-page limit for the narrative does not include the work plan, standard forms, Tribal Resolutions, budget, budget justifications, narratives, and/or other items. Page limits for each section within the project narrative are guidelines, not hard limits.

There are three parts to the narrative: Part 1—Program Information; Part 2—Program Planning and Evaluation; and Part 3—Program Report. See below for additional details about what must be included in the narrative.

The page limits below are for each narrative and budget submitted.

Part 1: Program Information (limit—2 pages)

Section 1: Needs

Describe how the T/TO has determined the need to either enhance or develop Tribal management capability to either assume PFSAs or not in the interest of Self-Determination. Note the progression of previous TMG projects/awards if applicable.

Part 2: Program Planning and Evaluation (limit—11 pages)

Section 1: Program Plans

Describe fully and clearly the direction the T/TO plans to take with the selected TMG Project type in addressing their health management infrastructure, including how the T/TO's plans to demonstrate improved health and services to the community or communities it serves. Include proposed timelines.

Section 2: Program Evaluation

Describe fully and clearly the improvements that will be made by the T/TO that will impact their management capability or prepare them for future improvements to their organization that will allow them to manage their health care system and identify the anticipated or expected benefits for the Tribe.

Part 3: Program Report (limit—2 pages)

Section 1: Describe your organization's significant program activities and accomplishments over the past 5 years associated with the goals of this announcement.

Please identify and describe significant program achievements associated with the delivery of quality health services. Provide a comparison of the actual accomplishments to the goals established for the project period, or if applicable, provide justification for the lack of progress.

B. Budget Narrative (limit—5 pages)

Provide a budget narrative that explains the amounts requested for each line item of the budget from the SF–424A (Budget Information for Non-Construction Programs) for the entire project, by year. The applicant can submit with the budget narrative a more detailed spreadsheet than is provided by the SF–424A (the spreadsheet will not be considered part of the budget narrative). The budget narrative should specifically describe how each item would support the achievement of proposed objectives. Be very careful about showing how each item in the ''Other'' category is justified. Do NOT use the budget narrative to expand the project narrative.

3. Submission Dates and Times

Applications must be submitted through *Grants.gov* by 11:59 p.m. Eastern Time on the Application Deadline Date. Any application received after the application deadline will not be accepted for review. *Grants.gov* will notify the applicant via email if the application is rejected.

If technical challenges arise and assistance is required with the application process, contact *Grants.gov* Customer Support (see contact information at *https://www.Grants.gov*). If problems persist, contact Mr. Paul Gettys, Deputy Director, DGM, by email at *DGM@ihs.gov.* Please be sure to contact Mr. Gettys at least 10 days prior to the application deadline. Please do not contact the DGM until you have received a *Grants.gov* tracking number. In the event you are not able to obtain a tracking number, call the DGM as soon as possible.

The IHS will not acknowledge receipt of applications.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

- Pre-award costs are allowable up to 90 days before the start date of the award provided the costs are otherwise allowable if awarded. Pre-award costs are incurred at the risk of the applicant.
- The available funds are inclusive of direct and indirect costs.
- Only one grant may be awarded per applicant.

6. Electronic Submission Requirements

All applications must be submitted via *Grants.gov*. Please use the *https://www.Grants.gov* website to submit an application. Find the application by selecting the ''Search Grants'' link on the homepage. Follow the instructions for submitting an application under the Package tab. No other method of application submission is acceptable.

If you cannot submit an application through *Grants.gov*, you must request a waiver prior to the application due date. You must submit your waiver request by email to *DGM@ihs.gov.* Your waiver request must include clear justification for the need to deviate from the required application submission process. The IHS will not accept any applications submitted through any means outside of *Grants.gov* without an approved waiver.

If the DGM approves your waiver request, you will receive a confirmation of approval email containing submission instructions. You must include a copy of the written approval with the application submitted to the DGM. Applications that do not include a copy of the waiver approval from the DGM will not be reviewed. The Grants Management Officer of the DGM will notify the applicant via email of this decision. Applications submitted under waiver must be received by the DGM no later than 5:00 p.m. Eastern Time on the Application Deadline Date. Late applications will not be accepted for processing. Applicants that do not register for both the System for Award Management (SAM) and *Grants.gov* and/or fail to request timely assistance with technical issues will not be considered for a waiver to submit an application via alternative method.

Please be aware of the following:

- Please search for the application package in *https://www.Grants.gov* by entering the Assistance Listing number or the Funding Opportunity Number. Both numbers are located in the header of this announcement.
- If you experience technical challenges while submitting your application, please contact *Grants.gov* Customer Support (see contact information at *https://www.Grants.gov*).
- Upon contacting *Grants.gov*, obtain a tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and a waiver from the agency must be obtained.
- Applicants are strongly encouraged not to wait until the deadline date to begin the application process through *Grants.gov* as the registration process for *SAM* and *Grants.gov* could take up to 20 working days.
- Please follow the instructions on *Grants.gov* to include additional documentation that may be requested by this funding announcement.
- Applicants must comply with any page limits described in this funding announcement.
- After submitting the application, you will receive an automatic acknowledgment from *Grants.gov* that contains a *Grants.gov* tracking number. The IHS will not notify you that the application has been received.

System for Award Management

Organizations that are not registered with the SAM must access the SAM online registration through the SAM home page at *https://sam.gov.* Organizations based in the United States (U.S.) will also need to provide an Employer Identification Number from the Internal Revenue Service that may take an additional 2–5 weeks to become active. Please see SAM.gov for details on the registration process and timeline. Registration with the SAM is free of charge but can take several weeks to process. Applicants may register online at *https://sam.gov.*

Unique Entity Identifier

Your *SAM.gov* registration now includes a Unique Entity Identifier (UEI), generated by *SAM.gov*, which replaces the DUNS number obtained from Dun and Bradstreet. *SAM.gov* registration no longer requires a DUNS number.

Check your organization's SAM.gov registration as soon as you decide to apply for this program. If your *SAM.gov* registration is expired, you will not be able to submit an application. It can take several weeks to renew it or resolve any issues with your registration, so do not wait.

Check your *Grants.gov* registration. Registration and role assignments in *Grants.gov* are self-serve functions. One user for your organization will have the authority to approve role assignments, and these must be approved for active users in order to ensure someone in your organization has the necessary access to submit an application.

The Federal Funding Accountability and Transparency Act of 2006, as amended (''Transparency Act''), requires all HHS recipients to report information on sub-awards. Accordingly, all IHS recipients must notify potential first-tier sub-recipients that no entity may receive a first-tier sub-award unless the entity has provided its UEI number to the prime recipient organization. This requirement ensures the use of a universal identifier to enhance the quality of information available to the public pursuant to the Transparency Act.

Additional information on implementing the Transparency Act, including the specific requirements for SAM, are available on the DGM Grants Management, Policy Topics web page at *https://www.ihs.gov/dgm/policytopics/.*

V. Application Review Information

Possible points assigned to each section are noted in parentheses. The project narrative and budget narrative should include the proposed activities for the entire period of performance. The project narrative should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of the applicant. It should be well organized, succinct, and contain all information necessary for reviewers to fully understand the project. Attachments requested in the criteria do not count toward the page limit for the narratives. Points will be assigned to each evaluation criteria adding up to a total of 100 possible points. Points are assigned as follows:

1. Evaluation Criteria

A. Introduction and Need for Assistance (20 points)

1. Describe the T/TO's current health operation. Include a list of programs and services that are currently provided (*e.g.,* federally funded, state funded, etc.), information regarding technologies currently used (*e.g.,* hardware, software, services, etc.), and identify the source(s) of technical support for those technologies (*i.e.,* Tribal staff, Area office IHS, vendor, etc.). Include information regarding whether the T/TO has a health department and/or health board and how long it has been operating.

2. Describe the population to be served by the proposed project. Include the total number of eligible IHS beneficiaries currently using the services.

3. Describe the geographic location of the proposed project, including any geographic barriers to health care users in the area to be served.

4. Identify all TMGs received since FY 2013, dates of funding, and a summary of project accomplishments. State how previous TMG funds facilitated the progression of health development relative to the current proposed project. (Copies of reports will not be accepted.)

5. Identify the eligible project type and priority group of the applicant.

6. Explain the need or reason for the proposed TMG project. Identify specific weaknesses and gaps in service or infrastructure that will be addressed by the proposal. Explain how these gaps and weaknesses will be assessed.

7. If the proposed TMG project includes information technology (*i.e.,* hardware, software, etc.), provide further information regarding measures that have occurred or will occur to ensure the proposed project will not create other gaps in services or infrastructure (*e.g.,* negatively affect or impact IHS interface capability, Government Performance and Results Act reporting requirements, contract reporting requirements, Information Technology (IT) compatibility, etc.), if applicable.

8. Describe the effect of the proposed TMG project on current programs (*e.g.,* federally funded, state funded, etc.), and, if applicable, on current equipment (*e.g.,* hardware, software, services, etc.). Include the effect of the proposed project on planned or anticipated programs and equipment.

9. Address how the proposed TMG project relates to the purpose of the TMG Program by addressing the appropriate description that follows:

a. Identify whether the T/TO is an IHS title I contractor. Address if the Self-Determination contract is a master contract of several programs or if individual contracts are used for each program. Include information regarding whether or not the T/TO participates in a consortium contract (*i.e.,* more than one Tribe participating in a contract). Address what programs are currently provided through those contracts and how the proposed TMG project will enhance the organization's capacity to manage the contracts currently in place.

b. Identify if the T/TO is not an IHS title I contractor Address how the proposed TMG project will enhance the organization's management capabilities, what programs and services the organization is currently seeking to contract, and an anticipated date for contract.

c. Identify if the T/TO is an IHS title V compactor. Address when the T/TO entered into the compact and how the proposed project will further enhance the organization's management capabilities.

B. Project Objective(s), Work Plan, and Approach (40 points)

1. The proposed project objectives must be:

a. measureable and (if applicable) quantifiable;

b. results-oriented;

c. time-limited.

Example: By installing new third-party billing software, the Tribe proposes to increase the number of claims processed by 15 percent within 12 months.

2. For each objective, address how the proposed TMG project will result in change or improvement in program operations or processes. Also address what tangible products are expected from the project (*i.e.,* policies and procedures manual, health plan, etc.).

3. Address the extent to which the proposed project will build local capacity to provide, improve, or expand services that address the needs of the target population.

4. Submit a work plan in the Other Attachments that includes the following:

a. Provide action steps on a timeline for accomplishing the proposed project objectives.

b. Identify who will perform the action steps.

c. Identify who will supervise the action steps taken.

d. Identify tangible products that will be produced during and at the end of the proposed project.

e. Identify who will accept and/or approve work products during the duration of the proposed TMG project and at the end of the proposed project.

f. Include a description of any training activities proposed. This description will identify the target audience and training personnel.

g. Include work plan evaluation activities.

5. If consultants or contractors will be used during the proposed project, please complete the following information in their scope of work. (If consultants or contractors will not be used, please make note in this section):

a. Educational requirements.

b. Desired qualifications and work experience.

c. Expected work products to be delivered, including a timeline.

If potential consultants or contractors have already been identified, please upload a resume for each consultant or contractor in the Other Attachments in *Grants.gov*.

6. Describe updates that will be required for the continued success of the proposed TMG project (*i.e.,* revision of policies/procedures, upgrades, technical support, etc.). Include a timeline of anticipated updates and/or maintenance.

C. Program Evaluation (20 Points)

Each proposed objective requires an evaluation activity (such as a logic model) to assess its progression and ensure completion. This should be included in the work plan.

Describe the proposal's plan to evaluate project processes and outcomes. Outcome evaluation relates to the results identified in the objectives. Process evaluation relates to the work plan and activities of the project.

1. For outcome evaluation, describe:

a. The criteria for determining whether each objective was met.

b. The data to be collected to determine whether the objective was met.

c. Data collection intervals.

d. Who will be responsible for collecting the data and their qualifications.

e. Data analysis method.

f. How the results will be used.

2. For process evaluation, describe:

a. The process for monitoring and assessing potential problems, then identifying quality improvements.

b. Who will be responsible for monitoring and managing project improvements based on results of ongoing process improvements and their qualifications.

c. Provide details with regards to the ways ongoing monitoring will be used to improve the project.

d. Describe any products, such as manuals or policies, that might be developed and how they might lend themselves to replication by others.

e. How the T/TO will document what is learned throughout the project period.

3. Describe any additional evaluation efforts planned after the grant period has ended.

4. Describe the ultimate benefit to the T/TO that is expected to result from this project. An example would be a T/TO's ability to expand preventive health services because of increased billing and third-party payments.

D. Organizational Capabilities, Key Personnel, and Qualifications (15 Points)

This section outlines the T/TO's capacity to complete the proposal outlined in the work plan. It includes the identification of personnel responsible for completing tasks and the chain of responsibility for completion of the proposed plan.

1. Provide the organizational structure of the T/TO.

2. Provide information regarding plans to obtain management systems if a T/TO does not have an established management system currently in place that complies with 25 CFR part 900 subpart F, ''Standards for Tribal or Tribal Organization Management Systems.'' State if management systems are already in place and how long the systems have been in place.

3. Describe the ability of the T/TO to manage the proposed project. Include information regarding similarly sized projects in scope and financial assistance as well as other grants and projects successfully completed.

4. Describe equipment (*e.g.,* fax machine, telephone, computer, etc.) and facility space (*i.e.,* office space) that will be available for use during the proposed project. Include information about any equipment not currently available that will be purchased through the grant.

5. List key project personnel and their titles in the work plan.

6. Provide the position descriptions and resumes for all key personnel as Other Attachments in *Grants.gov*. The included position descriptions should: (1) clearly describe each position's duties; and (2) indicate desired qualifications and project associated experience. Each resume must include a statement indicating that the proposed key personnel is explicitly qualified to carry out the proposed project activities. If no current candidate for a position exists, please provide a statement to that effect in the Other Attachments.

7. If an individual is partially funded by this grant, indicate the percentage of his or her time to be allocated to the project and identify the resources used to fund the remainder of that individual's salary.

8. Address how the T/TO will sustain the proposal created positions after the grant expires. Please indicate if the project requires additional personnel (*i.e.,* IT support, etc.). If no additional personnel are required, please indicate that in this section.

E. Categorical Budget and Budget Justification (5 Points)

1. Provide a categorical budget for the first budget period.

2. If indirect costs are claimed, indicate and apply the current negotiated rate to the budget. Include a copy of the rate agreement in the Other Attachments.

3. Provide a narrative justification explaining why each categorical budget line item is necessary and relevant to the proposed project. Include sufficient cost and other details to facilitate the determination of cost allowability (*e.g.,* equipment specifications, etc.).

2. Review and Selection

Each application will be prescreened for eligibility and completeness as outlined in this funding announcement. The Review Committee (RC) will review applications that meet the eligibility criteria. The RC will review the applications for merit based on the evaluation criteria. Incomplete applications and applications that are not responsive to the administrative thresholds (budget limit, period of performance limit) will not be referred to the RC and will not be funded. The DGM will notify the applicant of this determination.

Applicants must address all program requirements and provide all required documentation.

3. Notifications of Disposition

All applicants will receive an Executive Summary Statement from the IHS Office of Direct Service and Contracting Tribes within 30 days of the conclusion of the review outlining the strengths and weaknesses of their application. The summary statement

will be sent to the Authorizing Official identified on the face page (SF–424) of the application.

A. Award Notices for Funded Applications

The NoA is the authorizing document for which funds are dispersed to the approved entities and reflects the amount of Federal funds awarded, the purpose of the award, the terms and conditions of the award, the effective date of the award, the budget period, and period of performance. Each entity approved for funding must have a user account in GrantSolutions in order to retrieve the NoA. Please see the Agency Contacts list in Section VII for the systems contact information.

B. Approved but Unfunded Applications

Approved applications not funded due to lack of available funds will be held for 1 year. If funding becomes available during the course of the year, the application may be reconsidered.

NOTE: Any correspondence, other than the official NoA executed by an IHS grants management official announcing to the project director that an award has been made to their organization, is not an authorization to implement their program on behalf of the IHS.

VI. Award Administration Information

1. Administrative Requirements

Awards issued under this announcement are subject to, and are administered in accordance with, the following regulations and policies:

A. The criteria as outlined in this program announcement.

B. Administrative Regulations for Grants:

- Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards currently in effect or implemented during the period of award, other Department regulations and policies in effect at the time of award, and applicable statutory provisions. At the time of publication, this includes 45 CFR part 75, at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-part75.pdf.*
- If you receive an award, HHS may terminate it if any of the conditions in 2 CFR 200.340(a)(1)–(4) are met. Please review all HHS regulatory provisions for Termination at 45 CFR 75.372, at the time of this publication located at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-sec75-372.pdf.*

C. Grants Policy:

- HHS Grants Policy Statement, Revised January 2007, at *https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf.*

D. Cost Principles:

- Uniform Administrative Requirements for HHS Awards, ''Cost Principles,'' at 45 CFR part 75 subpart E, at the time of this publication located at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-part75-subpartE.pdf.*

E. Audit Requirements:

- Uniform Administrative Requirements for HHS Awards, ''Audit Requirements,'' at 45 CFR part 75 subpart F, at the time of this publication located at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-part75-subpartF.pdf.*

F. As of August 13, 2020, 2 CFR part 200 was updated to include a prohibition on certain telecommunications and video surveillance services or equipment. This prohibition is described in 2 CFR 200.216. This will also be described in the terms and conditions of every IHS grant and cooperative agreement awarded on or after August 13, 2020.

2. Indirect Costs

This section applies to all recipients that request reimbursement of IDC in their application budget. In accordance with HHS Grants Policy Statement, Part II–27, the IHS requires applicants to obtain a current IDC rate agreement and submit it to the DGM prior to the DGM issuing an award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate covers the applicable award activities under the current award's budget period. If the current rate agreement is not on file with the DGM at the time of award, the IDC portion of the budget will be restricted. The restrictions remain in place until the current rate agreement is provided to the DGM.

Please refer to 2 CFR 200.414(f) Indirect (F&A) costs, found at *https://www.govinfo.gov/content/pkg/CFR-2023-title2-vol1/pdf/CFR-2023-title2-vol1-sec200-414.pdf.*

Electing to charge a de minimis rate of 10 percent can be used by applicants who have received an approved negotiated indirect cost rate from HHS or another cognizant Federal agency. Applicants awaiting approval of their indirect cost proposal may request the 10 percent de minimis rate. When the applicant chooses this method, costs included in the indirect cost pool must not be charged as direct costs to the award.

Available funds are inclusive of direct and appropriate indirect costs. Approved indirect funds are awarded as part of the award amount, and no additional funds will be provided.

Generally, IDC rates for IHS recipients are negotiated with the Division of Cost Allocation at *https://rates.psc.gov/* or the Department of the Interior (Interior Business Center) at *https://ibc.doi.gov/ICS/tribal.* For questions regarding the indirect cost policy, please write to *DGM@ihs.gov.*

3. Reporting Requirements

The recipient must submit required reports consistent with the applicable deadlines. Failure to submit required reports within the time allowed may result in suspension or termination of an active award, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in the imposition of special award provisions and/or the non-funding or non-award of other eligible projects or activities. This requirement applies whether the delinquency is attributable to the failure of the recipient organization or the individual responsible for preparation of the reports. Per DGM policy, all reports must be submitted electronically by attaching them as a ''Grant Note'' in *GrantSolutions.* Personnel responsible for submitting reports will be required to obtain a login and password for GrantSolutions. Please use the form under the Recipient User section of *https://www.grantsolutions.gov/home/getting-started-request-a-user-account/.* Download the Recipient User Account Request Form, fill it out completely, and submit it as described on the web page and in the form.

The reporting requirements for this program are noted below.

A. Progress Reports

Program progress reports are required semi-annually. The progress reports are due within 30 days after the reporting period ends (specific dates will be listed in the NoA Terms and Conditions). These reports must include a brief comparison of actual accomplishments to the goals established for the period, a summary of progress to date or, if applicable, provide sound justification for the lack of progress, and other pertinent information as required. Recipient must submit a final report within 120 days of the period of performance end date.

B. Financial Reports

Federal Financial Reports are due 90 days after the end of each budget period, and a final report is due 120 days after the end of the period of performance.

Recipients are responsible and accountable for reporting accurate information on all required reports: the Progress Reports and the Federal Financial Report.

Failure to submit timely reports may result in adverse award actions blocking access to funds.

C. Federal Sub-Award Reporting System (FSRS)

This award may be subject to the Transparency Act sub-award and executive compensation reporting requirements of 2 CFR part 170.

The Transparency Act requires the OMB to establish a single searchable database, accessible to the public, with information on financial assistance awards made by Federal agencies. The Transparency Act also includes a requirement for recipients of Federal awards to report information about first-tier sub-awards and executive compensation under Federal assistance awards.

The IHS has implemented a Term of Award into all IHS Standard Terms and Conditions, NoAs, and funding announcements regarding the FSRS reporting requirement. This IHS Term of Award is applicable to all IHS grant and cooperative agreements issued on or after October 1, 2010, with a $25,000 sub-award obligation threshold met for any specific reporting period.

For the full IHS award term implementing this requirement and additional award applicability information, visit the DGM Grants Management website at *https://www.ihs.gov/dgm/policytopics/.*

D. Non-Discrimination Legal Requirements for Awardees of Federal Financial Assistance (FFA)

• If you receive an award, you must follow all applicable nondiscrimination laws. You agree to this when you register in SAM.gov. You must also submit an Assurance of Compliance (HHS–690). To learn more, see *https://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/laws/index.html.* Pursuant to 45 CFR 80.3(d), an individual shall not be deemed subjected to discrimination by reason of their exclusion from benefits limited by Federal law to individuals eligible for benefits and services from the IHS.

E. Federal Awardee Performance and Integrity Information System (FAPIIS)

The IHS is required to review and consider any information about the applicant that is in the FAPIIS at *https://sam.gov/content/fapiis* before making any award in excess of the simplified acquisition threshold (currently $250,000) over the period of performance. An applicant may review and comment on any information about itself that a Federal awarding agency previously entered. The IHS will consider any comments by the applicant, in addition to other information in FAPIIS, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants, as described in 45 CFR 75.205.

As required by 45 CFR part 75 Appendix XII of the Uniform Guidance, NFEs are required to disclose in FAPIIS any information about criminal, civil, and administrative proceedings, and/or affirm that there is no new information to provide. This applies to NFEs that receive Federal awards (currently active grants, cooperative agreements, and procurement contracts) greater than $10 million for any period of time during the period of performance of an award/project.

Mandatory Disclosure Requirements

As required by 2 CFR part 200 of the Uniform Guidance, and the HHS implementing regulations at 45 CFR part 75, the IHS must require an NFE or an applicant for a Federal award to disclose, in a timely manner, in writing to the IHS or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.

All applicants and recipients must disclose in writing, in a timely manner, to the IHS and to the HHS Office of Inspector General all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. 45 CFR 75.113.

Disclosures must be sent in writing to: U.S. Department of Health and Human Services, Indian Health Service, Division of Grants Management, ATTN: Marsha Brookins, Director, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, (Include ''Mandatory Grant Disclosures'' in subject line), Office: (301) 443–4750, Fax: (301) 594–0899, Email: *DGM@ihs.gov.*

AND

U.S. Department of Health and Human Services, Office of Inspector General, ATTN: Mandatory Grant Disclosures, Intake Coordinator, 330 Independence Avenue SW, Cohen Building, Room 5527, Washington, DC 20201, URL: *https://oig.hhs.gov/fraud/report-fraud/*, (Include ''Mandatory Grant Disclosures'' in subject line), Fax: (202) 205–0604 (Include ''Mandatory Grant Disclosures'' in subject line)

or

Email: *MandatoryGranteeDisclosures@oig.hhs.gov.*

Failure to make required disclosures can result in any of the remedies described in 45 CFR 75.371 Remedies for noncompliance, including suspension or debarment (see 2 CFR part 180 and 2 CFR part 376).

VII. Agency Contacts

1. Questions on the programmatic issues may be directed to: Terri Schmidt, Director, Office of Direct Service and Contracting Tribes, Indian Health Service, 5600 Fishers Lane, Mail Stop: 08E17, Rockville, MD 20857, Phone: (301) 443–1104, Email: *terri.schmidt@ihs.gov.*

2. Questions on grants management and fiscal matters may be directed to: Indian Health Service, Division of Grants Management, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, Email: *DGM@ihs.gov.*

3. For technical assistance with *Grants.gov*, please contact the *Grants.gov* help desk at (800) 518–4726, or by email at *support@grants.gov.*

4. For technical assistance with GrantSolutions, please contact the GrantSolutions help desk at (866) 577–0771, or by email at *help@grantsolutions.gov.*

VIII. Other Information

The Public Health Service strongly encourages all grant, cooperative agreement, and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the HHS mission to protect and advance the physical and mental health of the American people.

Roselyn Tso,

Director, Indian Health Service.

[FR Doc. 2023–28586 Filed 12–27–23; 8:45 am]

BILLING CODE 4166–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Comparative Primate Aging and Longevity.

Date: January 30, 2024.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kaitlyn Noel Lewis Hardell, Ph.D., M.P.H., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 2E405, Bethesda, MD 20892, (301) 555–1234, *kaitlyn.hardell@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 22, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28681 Filed 12–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK-Special Emphasis Panel.

Date: February 23, 2024.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Xiaodu Guo, Ph.D., M.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7023, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 22, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28679 Filed 12–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Elder Abuse & ADRD.

Date: January 25, 2024.

Time: 12:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Dario Dieguez, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 2W200, Bethesda, MD 20892, (301) 827–3101, *dario.dieguez@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 22, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28676 Filed 12–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; NAD CT.

Date: February 7, 2024.

Time: 12:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Bita Nakhai, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 2C212, Bethesda, MD 20892, 301–402–7701, *nakhaib@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 22, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28682 Filed 12–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; R13 Conference Grant Applications.

Date: February 22, 2024.

Time: 10:00 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7111, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, *yangj@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 22, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28678 Filed 12–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK-Special Emphasis Panel.

Date: February 20, 2024.

Time: 11:00 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Xiaodu Guo, Ph.D., M.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7023, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 22, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28680 Filed 12–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Member Conflict SEP for mid-career awards/Clinical candidates.

Date: February 12, 2024.

Time: 9:30 a.m. to 12:25 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Maurizio Grimaldi, M.D., Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 2C218, Bethesda, MD 20892, 301–496–9374, *grimaldim2@mail.nih.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 22, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28677 Filed 12–27–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

2024 Trade Facilitation and Cargo Security Summit Notice; Technical Correction

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice; technical correction.

SUMMARY: On November 8, 2023, U.S. Customs and Border Protection (CBP) published a notice in the **Federal Register**, which announced that U.S. Customs and Border Protection (CBP) will convene the 2024 Trade Facilitation and Cargo Security (TFCS) Summit in Philadelphia, PA, on March 26–28, 2024. This technical correction corrects the November 8, 2023 notice to reflect the proper amounts for the in-person and virtual attendance registration fees. For convenience, CBP is republishing the full text of the November 8, 2023

notice below, with the corrected registration fee amounts.

DATES: Tuesday, March 26, 2024 (opening remarks and general sessions, 8:00 a.m.–5:00 p.m. EDT), Wednesday, March 27, 2024 (breakout sessions, 8:00 a.m.–5:00 p.m. EDT), and Thursday, March 28, 2024 (breakout sessions, 8:00 a.m.–12:00 p.m. EDT).

ADDRESSES: The 2024 Trade Facilitation and Cargo Security Summit will be held at the Philadelphia Marriott Downtown at 1201 Market Street, Philadelphia, PA 19107. Directional signage will be displayed throughout the event space for registration, the sessions, and the exhibits.

Registration: Registration will open January 10, 2024 at 12:00 p.m. EST and close March 14, 2024 at 4:00 p.m. EDT. Registration information, including registration links when available, may be found on the event web page at *https://www.cbp.gov/trade/stakeholder-engagement/trade-facilitation-and-cargo-security-summit.* All registrations must be made online and will be confirmed with payment by credit card only. The registration fee to attend in person is $346.00 per person. The registration fee to attend via webinar is $32.00. Interested parties are requested to register immediately as space is limited. Members of the public who are pre-registered to attend and later need to cancel, may do so by using the link from their confirmation email or sending an email to *TFCSSummit@cbp.dhs.gov.* Please include your name and confirmation number with your cancellation request. Cancellation requests made after Friday, March 1, 2024, will not receive a refund.

FOR FURTHER INFORMATION CONTACT: Mrs. Daisy Castro, Office of Trade Relations, U.S. Customs and Border Protection at (202) 344–1440 or at *TFCSSummit@cbp.dhs.gov.* The most current 2024 TFCS Summit information can be found at *https://www.cbp.gov/trade/stakeholder-engagement/trade-facilitation-and-cargo-security-summit.*

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, please contact Mrs. Daisy Castro, Office of Trade Relations, U.S. Customs and Border Protection at (202) 344–1440 or at *TFCSSummit@cbp.dhs.gov,* as soon as possible.

SUPPLEMENTARY INFORMATION: On November 8, 2023, U.S. Customs and Border Protection published a notice in the **Federal Register** (88 FR 77105), announcing that the 2024 Trade Facilitation and Cargo Security (TFCS) Summit would convene in Philadelphia, PA on March 26–28, 2024. This notice makes a technical correction to the November 8, 2023 notice to reflect the proper amount of in-person and virtual attendance registration fees.

For ease of reference, CBP is republishing the entirety of the November 8, 2023 notice, with the change described.

The format of the 2024 TFCS Summit will consist of general sessions on the first day and breakout sessions on the second and third days. The 2024 TFCS Summit will feature panels composed of CBP personnel, members of the trade community, and members of other government agencies. The panel discussions will address the Customs Trade Partnership Against Terrorism (CTPAT), the Uyghur Forced Labor Prevention Act (UFLPA), the 21st Century Customs Framework (21CCF), the Automated Commercial Environment (ACE) 2.0, and other topics of interest to the trade community. The 2024 TFCS Summit agenda can be found on the CBP website: *https://www.cbp.gov/trade/stakeholder-engagement/trade-facilitation-and-cargo-security-summit.*

Hotel accommodations have been made available at the Philadelphia Marriott Downtown at 1201 Market Street, Philadelphia, PA 19107. Hotel room block reservation information can be found on the event web page at *https://www.cbp.gov/trade/stakeholder-engagement/trade-facilitation-and-cargo-security-summit.*

Alice A. Kipel,

Executive Director, Regulations & Rulings, Office of Trade.

[FR Doc. 2023–28655 Filed 12–27–23; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[245A2100DD/AAKC001030/A0A501010.999900]

Advisory Board of Exceptional Children

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Meeting.

SUMMARY: The Bureau of Indian Education (BIE) is announcing that the Advisory Board for Exceptional Children will hold a two-day in-person and online meeting. The purpose of the meeting is to meet the mandates of the Individuals with Disabilities Education Act of 2004 (IDEA) for Indian children with disabilities. Due to the COVID–19 pandemic and for the safety of all individuals, an online meeting option is provided for those who cannot attend in-person.

DATES: The BIE Advisory Board meeting will be held Thursday, January 18, 2024, from 8:30 a.m. to 4:30 p.m., Mountain Standard Time (MST) and Friday, January 19, 2024, from 8:30 a.m. to 4:30 p.m., Mountain Standard Time (MST).

ADDRESSES:

- *Meeting:* All Advisory Board activities and meetings will be conducted in-person and online. The onsite meeting location will be at the Sheraton Albuquerque Uptown Hotel located at 2600 Louisiana Blvd. NE, Albuquerque, NM 87110. See the **SUPPLEMENTARY INFORMATION** section of this notice for information on how to join the meeting.
- *Comments:* Public comments can be emailed to the DFO at *Jennifer.davis@bie.edu;* or faxed to (602) 265–0293 Attention: Jennifer Davis, DFO; or mailed or hand delivered to the Bureau of Indian Education, Attention: Jennifer Davis, DFO, 2600 N Central Ave., 12th floor, Suite 250, Phoenix, AZ 85004.

FOR FURTHER INFORMATION CONTACT: Jennifer Davis, Designated Federal Officer, Bureau of Indian Education, 2600 N Central Ave., 12th floor, Suite 250, Phoenix, AZ 85004, *Jennifer.Davis@bie.edu,* or mobile phone (202) 860–7845.

SUPPLEMENTARY INFORMATION: In accordance with the Federal Advisory Committee Act (5 U.S.C. 10), the BIE is announcing the Advisory Board will hold its next meeting in-person and online. The Advisory Board was established under the Individuals with Disabilities Act of 2004 (20 U.S.C. 1400 *et seq.*) to advise the Secretary of the Interior, through the Assistant Secretary-Indian Affairs, on the needs of Indian children with disabilities. All meetings, including virtual sessions, are open to the public in their entirety.

Meeting Agenda Items

The following agenda items will be for the January 18, 2024, and January 19, 2024, meeting. The reports concern special education topics.

- The BIE's Division of Performance and Accountability will provide an update on the BIE FFY2022 State Performance Plan/Annual Performance Report (SPP/APR), and the BIE Special Education Policy & Procedures Handbook.
- The Advisory Board will dialogue with the BIE Director to discuss progress regarding the recommendations within the previous annual reports (FFY 2020, FFY 2021, FFY 2022 and FFY 2023); BIE

plans for school year 2023–2024 update; and the BIE Strategic Direction Update.

- A panel discussion with a select group of Special Education Coordinators from BIE funded schools (Bureau Operated and Tribally Controlled Schools) to discuss post-secondary services, transition services, and graduation rates within their school, focusing on high school children with disabilities within the BIE education system.
- The advisory board will have multiple session to work on identifying priority topics for problems that could be creating barriers for children with disabilities within the BIE school system; lesson learned, determine improvements, recommendations for future projects or meetings, and discuss next steps.
- The Consortia of Administrators for Native American Rehabilitation (CANAR), Lanor Curole, President of CANAR will discuss services coordinated with the state vocational rehabilitation programs, and the number of students with disabilities being referred to state vocational rehabilitation program services.
- Four Public Commenting Sessions will be provided during both meeting days.

○ On Thursday, January 18, 2024, two sessions (15 minutes each) will be provided, 12:15 to 12:30 p.m. MST and 2 to 2:15 p.m. MST. Public comments can be provided via webinar or telephone conference call. Please use the online access codes as listed below.

○ On Friday, January 19, 2024, two sessions (15 minutes each) will be provided, 10 to 10:15 a.m. MST and 11:30 to 11:45 a.m. MST. Public comments can be provided during the meeting or telephone conference call. Please register for each meeting day to obtain the online meeting access codes as listed below.

○ Public comments can also be emailed to the DFO at *Jennifer.Davis@bie.edu;* or faxed to (602) 265–0293 Attention: Jennifer Davis, DFO; or mailed or hand delivered to the Bureau of Indian Education, Attention: Jennifer Davis, DFO, 2600 N Central Ave. 12th floor, Suite 250, Phoenix, Arizona 85004.

Online Meeting Access

To attend the January 18–19, 2024, advisory board meeting please register using this link: *https://www.zoomgov.com/meeting/register/vJIsdOuvrD8sEycmoRpjrKbOvtzFCapwAmw.* Attendees register once and can attend one or both meeting events. After registering, you will receive a confirmation email containing information about joining the meeting.

Accessibility Request

Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. Please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT** at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Authority: 5 U.S.C. Ch. 10.

Kathryn Isom-Clause,

Deputy Assistant Secretary—Indian Affairs for Policy and Economic Development, Exercising by delegation the authority of the Assistant Secretary—Indian Affairs.

[FR Doc. 2023–28712 Filed 12–27–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[245A2100DD/AAKC001030/A0A501010.999900]

Indian Gaming; Extension of Tribal-State Class III Gaming Compacts in California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice announces the extension of the Class III gaming compacts between three Tribes in California and the State of California.

DATES: The extension takes effect on December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, *IndianGaming@bia.gov;* (202) 219–4066.

SUPPLEMENTARY INFORMATION: An extension to an existing Tribal-State Class III gaming compact does not require approval by the Secretary if the extension does not modify any other terms of the compact. 25 CFR 293.5. The following Tribes and the State of California have reached an agreement to extend the expiration date of their existing Tribal-State Class III gaming compacts to December 31, 2024: the Berry Creek Rancheria of Maidu Indians of California; the Resighini Rancheria, California; and the Manchester Band of Pomo Indians of the Manchester Rancheria, California. This publication provides notice of the new expiration date of the compacts.

Kathryn Isom-Clause,

Deputy Assistant Secretary—Indian Affairs for Policy and Economic Development, Exercising by delegation the authority of the Assistant Secretary—Indian Affairs.

[FR Doc. 2023–28711 Filed 12–27–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_CA_FRN_MO4500161911]

Notice of Public Meetings: Northern California District Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Northern California District Resource Advisory Council (RAC) will meet as follows.

DATES: Wednesday and Thursday, January 31- February 1, 2024; Wednesday and Thursday, June 5–6, 2024; and Wednesday and Thursday, September 25–26, 2024. Field tours will be held on January 31, June 5, and September 25, from 10 a.m. to 4 p.m. Pacific Time (PT) each day. Business meetings will be held on February 1, June 6, and September 26 from 8 a.m. to 2 p.m. PT each day. Public comments will be accepted at 11 a.m. PT on each business meeting day.

ADDRESSES: The January–February meeting will be held at the Bureau of Land Management Northern California District Office, 6640 Lockheed Drive, Redding, CA 96002. The June meeting will be held at the BLM Arcata Field Office, 1695 Heindon Road, Arcata, CA 95521. The August meeting will be held at the BLM Surprise Field Station, 602 Cressler Street, Cedarville, CA 96104. Virtual participation options will also be available for the business meetings. Meeting links and participation instructions will be provided to the public via news media, social media, the BLM California website *blm.gov/get-involved/rac/California/northern-california-rac,* and through personal contact 2 weeks prior to the meetings. Written comments pertaining to the meetings can be sent to the BLM Northern California District Office, at

the address above, marked Attention: RAC meeting comments.

FOR FURTHER INFORMATION CONTACT: Public Affairs Officer Joseph J. Fontana, telephone: 530–260–0189, email: *jfontana@blm.gov*. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to contact Mr. Fontana in the United States.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with BLM-managed public lands in northern California and far northwest Nevada. The January 31 field tour will focus on restoration and public access improvements on public lands in the Sacramento River Bend Outstanding Natural Area north of Red Bluff, California. For the February 1 business meeting, agenda topics include a status report on the Northwest California Integrated Resource Management Plan, a report on the fire and fuels program management program, an overview of the BLM law enforcement program in the district, and reports from the BLM state director and Northern California District field managers. The June 5 field tour to the Samoa Dunes area near Eureka, California, will focus on BLM efforts to restore coastal dune habitats and provide access for recreation. For the June 6 business meeting, agenda topics include a status report on the Northwest California Integrated Resource Management Plan, an overview of partnerships active in the Arcata Field Office, a status report on BLM land tenure actions, and reports from the BLM state director and Northern California District field office managers. The September 25 field tour will focus on BLM efforts to restore historically significant features at a historic ranch area that has come into public ownership. For the September 26 business meeting agenda topics include a potential review of the final Record of Decision for the Northwest California Integrated Resource Management Plan, if applicable; a report on wild horse and burro management in herd management areas within the Applegate Field Office jurisdiction; an update on sage grouse habitat management and improvement projects; and reports from the BLM state director and Northern California field office managers.

All meetings are open to the public. Each formal council meeting will have time allocated for public comments. Depending on the number of persons wishing to speak and the time available, the amount of time for oral comments may be limited. Written public comments may be sent to the BLM Northern California District Office at the address listed in the **ADDRESSES** section of this notice. All comments received will be provided to the RAC.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Members of the public are welcome on field tours but must provide their own transportation and meals. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM (see **FOR FURTHER INFORMATION CONTACT**).

Detailed meeting minutes for the RAC meetings will be maintained in the Northern California District Office. Minutes will also be posted to the California RAC web page.

(Authority: 43 CFR 1784.4–2)

Erica St. Michel,

Deputy State Director, Communications.

[FR Doc. 2023–28714 Filed 12–27–23; 8:45 am]

BILLING CODE 4331–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–CEBE–36799; PPNECEBE00, PPMPSPD1Z.Y00000]

Request for Nominations for the Cedar Creek and Belle Grove National Historical Park Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Request for nominations.

SUMMARY: The National Park Service (NPS), U.S. Department of the Interior, is requesting nominations for qualified persons to serve as members on the Cedar Creek and Belle Grove National Historical Park Advisory Commission (Commission).

DATES: Written nominations must be received by January 29, 2024.

ADDRESSES: Nominations or requests for further information should be sent to Karen Beck-Herzog, Site Manager, Cedar Creek and Belle Grove National Historical Park, P.O. Box 700, Middletown, Virginia 22645, or via email *karen_beck-herzog@nps.gov.*

FOR FURTHER INFORMATION CONTACT: Karen Beck-Herzog, via telephone (540) 868–0938.

SUPPLEMENTARY INFORMATION: The Commission was established in accordance with the Cedar Creek and Belle Grove National Historical Park Act of 2002 (16 U.S.C. 410iii–7). The Commission was designated by Congress to provide advice to the Secretary of the Interior on the preparation and implementation of the park's general management plan and in the identification of sites of significance outside the park boundary.

The Commission consists of 15 members appointed by the Secretary, as follows:

(a) 1 representative from the Commonwealth of Virginia; (b) 1 representative each from the local governments of Strasburg, Middletown, Frederick County, Shenandoah County, and Warren County; (c) 2 representatives of private landowners within the Park; (d) 1 representative from a citizen interest group; (e) 1 representative from the Cedar Creek Battlefield Foundation; (f) 1 representative from the Belle Grove, Incorporated; (g) 1 representative from the National Trust for Historic Preservation; (h) 1 representative from the Shenandoah Valley Battlefields Foundation; (i) 1 ex-officio representative from the National Park Service; and (j) 1 ex-officio representative from the United States Forest Service. Alternate members may be appointed to the Commission.

We are currently seeking primary and alternate members to represent the Commonwealth of Virginia, the Shenandoah Valley Battlefields Foundation, the American Battlefield Trust, the Town of Strasburg, the Town of Middletown, Warren County, and private landowners within the Park.

Each member shall be appointed for a term of three years and may be reappointed for not more than two successive terms. A member may serve after the expiration of that member's term until a successor has been appointed. The Chairperson of the Commission shall be elected by the members to serve a term of one-year renewable for one additional year.

Nominations should be typed and should include a resume providing an adequate description of the nominee's

qualifications, including information that would enable the Department of the Interior to make an informed decision regarding meeting the membership requirements of the Commission and permit the Department to contact a potential member.

Members of the Commission serve without compensation. However, while away from their homes or regular places of business in the performance of services for the Commission as approved by the NPS, members may be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed such expenses under 5 U.S.C. 5703.

(Authority: 5 U.S.C. Ch. 10)

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2023–28708 Filed 12–27–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NCR–MAMC–36915; PPNCNACEN0, PPMPSAS1Z.Y00000]

Mary McLeod Bethune Council House National Historic Site Advisory Commission Notice of Public Meeting

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the National Park Service (NPS) is hereby giving notice that the Mary McLeod Bethune Council House National Historic Site Advisory Commission (Commission) will meet as indicated below.

DATES: The in-person meeting will take place from 10 a.m. to 5 p.m. or until business is completed on Wednesday, January 24, 2024, and from 9 a.m. to 3 p.m. on Thursday, January 25, 2024 (eastern).

ADDRESSES: The meeting will be held in the National Capital Parks-East Headquarters, 1900 Anacostia Drive SE, Washington, DC 20020.

FOR FURTHER INFORMATION CONTACT: Anyone interested in attending should contact Tara Morrison, Superintendent and Designated Federal Officer, National Capital Parks-East, 1900 Anacostia Drive SE, Washington, DC 20020, by telephone (771) 208–1450, or by email *nace_superintendent@nps.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The Commission is established by section 4 of Public Law 102–211 (54 U.S.C. 320101 formerly 16 U.S.C. 461 note). The purpose of the Commission is to fully participate in an advisory capacity with the Secretary of the Interior in the development of a General Management Plan for the historic site. The Commission will also, as often as necessary, but at least semiannually, meet and consult with the Secretary on matters relating to the management and development of the historic site.

Purpose of the Meeting: The purpose of the meeting is to discuss the following:

- Welcome and Introductions
- History of the Mary McLeod Bethune National Historic Site Advisory Commission
- Review and the Federal Advisory Commission Act (5 U.S.C. Ch. 10)
- Site Update and Improvements—Past, Present & Future
- How an Advisory Commission Functions—Election of Chair and Vice Chair
- NPS Expectations/Priorities for Advisory Commission
- Advisory Commission Expectations

The proposed agenda may change to accommodate commission business. The final agenda for this meeting will be provided on the Park website at *https://www.nps.gov/mamc/index.htm.* Interested persons may present, either orally or through written comments, information for the Commission to consider during the public meeting. Written comments will be accepted prior to, during, or after the meeting. Members of the public may submit written comments by mailing them to the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Due to time constraints during the meeting, the Commission is not able to read written public comments submitted into the record. Individuals or groups requesting to make oral comments at the public Commission meeting will be limited to no more than three minutes per speaker. All comments will be made part of the public record and will be electronically distributed to all Commission members. Detailed minutes of the meeting will be available for public inspection within 90 days of the meeting.

Meeting Accessibility/Special Accommodations: The meeting is open to the public. Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Ch. 10.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2023–28709 Filed 12–27–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–D–COS–POL–37180; PPWODIREP0, PPMPSAS1Y.YP0000]

Notice of Public Meeting for the National Park System Advisory Board

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the National Park Service (NPS) is hereby giving notice that the National Park System Advisory Board (Board) will meet as noted below.

DATES: The Board will hold public meetings on Thursday March 7, 2024, from 9 a.m. until 5 p.m. (Pacific Standard Time) and Friday March 8, 2024, from 9 a.m. until 5 p.m. (Pacific Standard Time). Individuals that wish to participate must contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than February 29, 2024, to receive instructions for accessing the meeting. The meetings are open to the public.

ADDRESSES: The Board will meet at or near Joshua Tree National Park (exact meeting location to be determined) in California. Electronic submissions of

materials or requests are to be sent to *alma_ripps@nps.gov.* The meeting will also be accessible virtually via webinar and audio conference technology.

FOR FURTHER INFORMATION CONTACT: (a) For information concerning attending the Board meeting or to request to address the Board, contact Alma Ripps, Office of Policy, National Park Service, telephone (202) 354–3951, or email *alma_ripps@nps.gov.* (b) To submit a written statement specific to, or request information about, any NHL matter listed below, or for information about the National Historic Landmarks (NHL) Program or NHL designation process and the effects of designation, contact Lisa Davidson, Manager, NHL Program, email *lisa_davidson@nps.gov.* Written comments specific to any NHL matter listed below must be submitted by no later than March 1, 2024. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The Board has been established by authority of the Secretary of the Interior (Secretary) under 54 U.S.C. 100906 and is regulated by the Federal Advisory Committee Act.

Purpose of the Meeting: The Board will be briefed by NPS officials on the organization, programs, and priorities of the NPS, and will attend to housekeeping matters, including the potential establishment of committees. The Board will also receive NHL proposals for Board deliberation. There also will be an opportunity for public comment. The final agenda and briefing materials will be posted to the Board's website prior to the meeting at *https://www.nps.gov/resources/advisoryboard150.htm.*

The agenda may include the review of proposed actions regarding the NHL Program. Interested parties are encouraged to submit written comments and recommendations that will be presented to the Board. Interested parties also may attend the Board meeting and upon request may address the Board concerning an area's national significance.

National Historic Landmarks (NHL) Program

NHL Program matters will be considered, during which the Board may consider the following:

Nominations for NHL Designation

Commonwealth of the Northern Mariana Islands
- LATTE QUARRY AT AS NIEVES, Rota, CNMI

District of Columbia
- THE FURIES COLLECTIVE, Washington, DC

Kentucky
- BIG BONE LICK SITE, Union, KY

Nebraska
- KREGEL WINDMILL COMPANY FACTORY, Nebraska City, NE

South Carolina
- CHARLESTON CIGAR FACTORY, Charleston, SC

Proposed Amendments to Existing NHL Designations

Alaska
- SITKA NAVAL OPERATING BASE AND U.S. ARMY COASTAL DEFENSES (updated documentation), Sitka, AK
- LADD FIELD (updated documentation), Fairbanks, AK

Hawai'i
- PU'UKOHOLĀ HEIAU (updated documentation, boundary change), Kawaihae, HI

Michigan
- QUINCY MINING COMPANY HISTORIC DISTRICT (updated documentation, boundary change), Houghton County, MI
- CALUMET HISTORIC DISTRICT (updated documentation, boundary change), Calumet, MI

Missouri
- WATKINS MILL (updated documentation), Lawson, MO

Texas
- FORT BROWN (updated documentation, boundary change), Brownsville, TX

Virginia
- CEDAR CREEK BATTLEFIELD AND BELLE GROVE (updated documentation, boundary change), Middletown, VA

Wyoming
- WYOMING STATE CAPITOL BUILDING AND GROUNDS (updated documentation), Cheyenne, WY

Proposed Withdrawal of Existing Designations

North Carolina
- JOSEPHUS DANIELS HOUSE (WAKESTONE), Raleigh, NC

South Carolina
- *USS CLAMAGORE* (former), Mount Pleasant, SC

Interested persons may choose to make oral comments at the meeting during the designated time for this purpose. Depending on the number of people wishing to comment and the time available, the amount of time for oral comments may be limited. Interested parties should contact Alma Ripps (see **FOR FURTHER INFORMATION CONTACT**) for advance placement on the public speaker list for this meeting. Members of the public may also choose to submit written comments by emailing them to *alma_ripps@nps.gov.* Due to time constraints during the meeting, the Board is not able to read written public comments submitted into the record. All comments will be made part of the public record and will be electronically distributed to all Board members. Detailed minutes of the meeting will be available for public inspection within 90 days of the meeting.

Meeting Accessibility/Special Accommodations: Please make requests in advance for sign language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Public Disclosure of Comments: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. Ch. 10.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2023–28710 Filed 12–27–23; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–566 and 731–TA–1342 (Review)]

Softwood Lumber Products From Canada

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

1930 (''the Act''), that revocation of the countervailing duty and antidumping duty orders on softwood lumber products from Canada would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on December 1, 2022 (87 FR 73778) and determined on March 6, 2023 that it would conduct full reviews (88 FR 16458, March 17, 2023). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on April 18, 2023 (88 FR 23690). The Commission conducted its hearing on October 12, 2023. All persons who requested the opportunity were permitted to participate.

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on December 21, 2023. The views of the Commission are contained in USITC Publication 5479 (December 2023), entitled *Softwood Lumber Products from Canada: Investigation Nos. 701–TA–566 and 731–TA–1342 (Review).*

By order of the Commission.

Issued: December 21, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–28593 Filed 12–27–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–583 and 731–TA–1381 (Review)]

Cast Iron Soil Pipe Fittings From China

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping and countervailing duty orders on cast iron soil pipe fittings from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted these reviews on July 3, 2023 (88 FR 42753) and determined on October 6, 2023 that it would conduct expedited reviews (88 FR 75308, November 2, 2023).

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on December 21, 2023. The views of the Commission are contained in USITC Publication 5484 (December 2023), entitled *Cast Iron Soil Pipe Fittings from China: Investigation Nos. 701–TA–583 and 731–TA–1381 (Review).*

By order of the Commission.

Issued: December 21, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–28580 Filed 12–27–23; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

INTERNATIONAL TRADE COMMISSION

Agency Information Collection Activities: Submission for OMB Review; Renewal of Generic Clearance; Comment Request

AGENCY: International Trade Commission.

ACTION: Notice and comment request.

SUMMARY: Consistent with the Paperwork Reduction Act of 1995, the U.S. International Trade Commission (Commission) has submitted a proposal for the collection of information to the Office of Management and Budget (OMB) for approval. The proposed information collection is a three-year extension of the current generic clearance (approved by OMB under Control No. 3117–0222) under which the Commission can issue information collections for the collection of qualitative feedback on agency service delivery. Any comments submitted to OMB on the proposed information collection should be specific, indicating which part of the information collection plan is objectionable, describing the issue in detail, and including specific revisions or language changes. The Commission did not receive any comments in response to the 60-day notice that it published in the **Federal Register** on October 27, 2023.

DATES: Comments solicited under this notice must be submitted on or before January 29, 2024.

Comments: Comments about the proposal should be provided to the Office of Management and Budget, Office of Information and Regulatory Affairs through the Information Collection Review Dashboard at *https://www.reginfo.gov.* All comments should be specific, indicating which part of the renewal request is objectionable, describing the concern in detail, and including specific suggested revisions or language changes. Provide copies of any comments that you submit to OMB to Nancy Snyder, Director, Office of Analysis and Research Services, U.S. International Trade Commission at *Nancy.Snyder@usitc.gov.*

FOR FURTHER INFORMATION CONTACT: You may obtain copies of supporting documents from Zachary Coughlin, Statistical and Data Services Division, U.S. International Trade Commission, at *Zachary.Coughlin@usitc.gov,* 202–205–3435. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. You may also obtain general information concerning the Commission by accessing its website (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION:

(1) Need for the Proposed Information Collections

The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner. This qualitative feedback provides useful insights on perceptions and opinions of customers and stakeholders. The feedback helps the Commission gain understanding into customer or stakeholder experiences and expectations and provides an early warning of issues with service, or focuses attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections allow for ongoing, collaborative and actionable communications between the Commission and its customers and stakeholders and contribute directly to the improvement of program management.

(2) Description of the Information To Be Collected

The solicitation of feedback will target areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of

issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Commission's services will be unavailable.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are noncontroversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

(3) Estimated Burden of the Proposed Information Collection

The Commission estimates that information collections issued under the requested generic clearance will impose an average annual burden of 350 hours on 1,000 respondents.

No record-keeping burden is known to result from the proposed collection of information.

By order of the Commission.

Issued: December 21, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–28599 Filed 12–27–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Information Advisory Council

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of a WIAC meeting February 6–7, 2024.

SUMMARY: Notice is hereby given that the Workforce Information Advisory Council (WIAC or Advisory Council) will meet in person February 6–7, 2024. Information for public attendance, both in-person and virtually, will be posted at *www.dol.gov/agencies/eta/wioa/wiac/meetings* a week prior to the meeting dates. The meetings will be open to the public.

DATES: The meeting will take place February 6–7, 2024. The meeting will begin each day at 9:00 a.m. EST and conclude at approximately 5:00 p.m. EST. Public statements, requests for special accommodations, or requests to address the Advisory Council must be received by January 29, 2024.

ADDRESSES: The meeting will be held at the HYATT REGENCY CRYSTAL CITY, 2799 Richmond Hwy., Arlington, VA 22202. Any special instructions for attendance will be posted on the WIAC website, *www.dol.gov/agencies/eta/wioa/wiac/meetings.* If problems arise accessing the meeting, please contact Donald Haughton, Unit Chief in the Division of National Programs, Tools, and Technical Assistance, Employment and Training Administration, U.S. Department of Labor, at 202–203–9209.

FOR FURTHER INFORMATION CONTACT: Steven Rietzke, Chief, Division of National Programs, Tools, and Technical Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–4510, 200 Constitution Ave. NW, Washington, DC 20210; Telephone: 202–693–3912; Email: *WIAC@dol.gov.* Mr. Rietzke is the WIAC Designated Federal Officer (DFO).

SUPPLEMENTARY INFORMATION:

Background: This meeting is being held pursuant to Sec. 308 of the Workforce Innovation and Opportunity Act of 2014 (WIOA) (Pub. L. 113–128), which amends sec. 15 of the Wagner-Peyser Act of 1933 (29 U.S.C. 491–2). The WIAC is an important component of WIOA. The WIAC is a federal advisory committee of workforce and labor market information experts representing a broad range of national, State, and local data and information users and producers. The WIAC was established in accordance with provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. app.) and will act in accordance with the applicable provisions of FACA and its implementing regulation at 41 CFR 102–3. The purpose of the WIAC is to provide recommendations to the Secretary of Labor (Secretary), working jointly through the Assistant Secretary for Employment and Training and the Commissioner of Labor Statistics, to address: (1) the evaluation and improvement of the nationwide workforce and labor market information (WLMI) system and statewide systems that comprise the nationwide system; and (2) how the Department and the States will cooperate in the management of those systems. These systems include programs to produce employment-related statistics and State and local workforce and labor market information.

The Department of Labor anticipates the WIAC will accomplish its objectives by: (1) studying workforce and labor market information issues; (2) seeking and sharing information on innovative approaches, new technologies, and data to inform employment, skills training, and workforce and economic development decision making and policy; and (3) advising the Secretary on how the workforce and labor market information system can best support workforce development, planning, and program development. Additional information is available at *www.dol.gov/agencies/eta/wioa/wiac/meetings.*

Purpose: The WIAC is continually identifying and reviewing issues and aspects of the WLMI system and statewide systems that comprise the nationwide system and how the Department and the States will cooperate in the management of those systems. As part of this process, the

Advisory Council meets to gather information and to engage in deliberative and planning activities to facilitate the development and provision of its recommendations to the Secretary in a timely manner.

Agenda

Tuesday, February 6, 2024, 9:00 a.m.–5:00 p.m.

9:00 a.m.–9:15 a.m. Welcome, Review of Agenda, and Goals for Meeting Series
9:15 a.m.–9:45 a.m. Introductions and Opening Remarks from Leadership
9:45 a.m.–10:30 a.m. Review of Past WIAC Priorities and WLMI Updates
10:30 a.m.–10:50 a.m. 20-Minute Break
10:50 a.m.–12:00 p.m. Initial Walk-Through and Discussion of Brainstormed Topics from December 4th Virtual Meeting
12:00 p.m.–1:30 p.m. Lunch Break
1:30 p.m.–2:30 p.m. Brainstormed Topics, Continued: Subcommittee Interest
2:30 p.m.–2:50 p.m. 20-Minute Break
2:50 p.m.–4:50 p.m. The Role of WLMI in Unions, Research Entities, and Workforce Development Boards: Three Perspectives
4:50 p.m.–5:00 p.m. Closing and Next Steps

Meeting Day Two: Wednesday, February 7, 2024, 9:00 a.m.–5:00 p.m.

9:00 a.m.–9:15 a.m. Welcome and Review of Agenda
9:15 a.m.–10:30 a.m. Subcommittee Breakout Groups
10:30 a.m.–10:50 a.m. 20-Minute Break
10:50 a.m.–12:00 p.m. Subcommittee Breakout Groups, Continued
12:00 p.m.–1:30 p.m. Lunch Break
1:30 p.m.–3:00 p.m. Subcommittee Report Out
3:00 p.m.–3:20 p.m. 20-Minute Break
3:20 p.m.–3:50 p.m. Public Comment (at the discretion of the DFO)
3:50 p.m.–4:50 p.m. Group Discussion and Next Steps
4:50 p.m.–5:00 p.m. Closing Remarks

Attending the meetings: Members of the public who require reasonable accommodations to attend any of the meetings may submit requests for accommodations via email to the email address indicated in the **FOR FURTHER INFORMATION CONTACT** section with the subject line ''February 2024 WIAC Meeting Accommodations'' by the date indicated in the **DATES** section. Please include a specific description of the accommodations requested and phone number or email address where you may be contacted if additional information is needed to meet your request.

Public statements: Organizations or members of the public wishing to submit written statements may do so by mailing them to the person and address indicated in the **FOR FURTHER INFORMATION CONTACT** section by the date indicated in the **DATES** section or transmitting them as email attachments in PDF format to the email address indicated in the **FOR FURTHER INFORMATION CONTACT** section with the subject line ''February 2024 WIAC Meeting Public Statements'' by the date indicated in the **DATES** section. Submitters may include their name and contact information in a cover letter for mailed statements or in the body of the email for statements transmitted electronically. Relevant statements received before the date indicated in the **DATES** section will be included in the record of each meeting. No deletions, modifications, or redactions will be made to statements received, as they are public records. Please do not include personally identifiable information in your public statement.

Requests to Address the Advisory Council: Members of the public or representatives of organizations wishing to address the Advisory Council should forward their requests to the contact indicated in the **FOR FURTHER INFORMATION CONTACT** section, or contact the same by phone, by the date indicated in the **DATES** section. Oral presentations will be limited to 10 minutes, time permitting, and shall proceed at the discretion of the Advisory Council DFO. Individuals with disabilities, or others who need special accommodations, should indicate their needs along with their request.

Brent Parton,

Principal Deputy Assistant Secretary for Employment and Training.

[FR Doc. 2023–28587 Filed 12–27–23; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Improving Customer Experience (OMB Circular A–11, Section 280 Implementation) for the Department of Labor

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of the Assistant Secretary for Administration and Management (OASAM)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 29, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nora Hernandez by telephone at 202–693–8633, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This information collection activity provides a means to garner customer and stakeholder feedback in an efficient, timely manner in accordance with the Administration's commitment to improving customer service delivery as discussed in Section 280 of OMB Circular A–11. As discussed in OMB guidance, agencies should identify their highest-impact customer journeys (using customer volume, annual program cost, and/or knowledge of customer priority as weighting factors) and select touchpoints/transactions within those journeys to collect feedback. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 11, 2023 (88 FR 62401).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition,

notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OASAM.

Title of Collection: Improving Customer Experience (OMB Circular A–11, Section 280 Implementation) for the Department of Labor.

OMB Control Number: 1225–0093.

Affected Public: Individuals and Households; Private Sector; not-for-profit institutions; State, Local and Tribal Governments.

Total Estimated Number of Respondents: 2,001,550.

Total Estimated Number of Responses: 2,001,550.

Total Estimated Annual Time Burden: 101,125 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nora Hernandez,

Departmental Clearance Officer.

[FR Doc. 2023–28689 Filed 12–27–23; 8:45 am]

BILLING CODE 4510–04–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Department of Labor Generic Clearance for Outreach Activities

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of the Assistant Secretary for Administration and Management (OASAM)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 29, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nora Hernandez by telephone at 202–693–8633, or by email at *DOL_PRA_PUBLIC@dol.gov*.

SUPPLEMENTARY INFORMATION: The information collections under OMB Control No. 1225–0059 will be designed to support outreach opportunities related to a wide range of agency responsibilities including, but not limited to: pension programs, occupational safety and health programs, mine safety and health programs, veterans' programs, employment and training programs, statistical programs, and labor management standards. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on September 11, 2023 (88 FR 62401).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OASAM.

Title of Collection: Department of Labor Generic Clearance for Outreach Activities.

OMB Control Number: 1225–0059.

Affected Public: Individuals and Households; Private Sector; not-for-profit institutions; State, Local and Tribal Governments.

Total Estimated Number of Respondents: 800,000.

Total Estimated Number of Responses: 800,000.

Total Estimated Annual Time Burden: 80,000 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nora Hernandez,

Departmental Clearance Officer.

[FR Doc. 2023–28684 Filed 12–27–23; 8:45 am]

BILLING CODE 4510–04–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2009–0022]

Requirements for the OSHA Training Institute Education Centers Program and the OSHA Outreach Training Program; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Requirements for the OSHA Training Institute Education Centers Program and the OSHA Outreach Training Program.

DATES: Comments must be submitted (postmarked, sent, or received) by February 26, 2024.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the

docket are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number OSHA–2009–0022 for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it. Consistent with the authority of section 21 of the OSH Act, the agency created two educational programs, the OSHA Training Institute (OTI) Education Centers Program and the OSHA Outreach Training Program (Outreach).

To be a participant in the OTI Education Centers Programs or the Outreach Training Program, an individual/organization must provide the agency with certain information. The requested information is necessary to evaluate the applicant organization and to implement, oversee, and monitor the OTI Education Centers and Outreach Training Programs courses and trainers. The eleven collection of information requirements are listed below.

1. Application to become an OSHA Training Institute Education Center (OTI Education Center).
2. OTI Education Centers Monthly Summary Report for the OTI Education Centers and the Outreach Training Program Monthly Summary Report;
3. Statement of Compliance with Outreach Training Program Requirements;
4. Outreach Training Program Report Forms (includes Construction, General Industry, Maritime, and Disaster Site);
5. Online Outreach Training Program Report;
6. Active Trainer List;
7. OSHA Training Institute Student Survey (OSHA Form 49 11–05 Edition) (OMB 1225–0059) (Attachment I, OSHA Form 49 11–05 Edition).
8. Attendance Documentation for OTI Education Centers;
9. Outreach Online Training Certification Statement
10. Instructor and Staff Resumes (this includes anyone who may be assigned to conduct OSHA classes, contractor, subcontractor, employee, adjunct professor, etc.; and
11. Course Material upon Request by OSHA from OTI Education Centers.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Requirements for the OSHA Training Institute Education Centers Program and the OSHA Outreach Training Program. The agency is requesting an adjustment burden increase of 464 hours (from 15,913 hours to 16,377 hours). This increase is a result of an increase in the number of students trained and courses offered through the program.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Requirements for the OSHA Training Institute Education Centers Program and the OSHA Outreach Training Program.

OMB Control Number: 1218–0262.

Affected Public: Not-for-profit institutions; Federal government; State, local and tribal governments.

Number of Respondents: 26.

Number of Responses: 58,242.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 16,377.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at 202–693–1648; or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR. Docket No. OSHA–2009–0022 You may supplement electronic submissions by uploading document files electronically.

Comments and submissions are posted without change at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting

personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *https://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–28588 Filed 12–27–23; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Veterans' Employment and Training Service

Advisory Committee on Veterans' Employment, Training and Employer Outreach (ACVETEO): Meeting

AGENCY: Veterans' Employment and Training Service (VETS), Department of Labor (DOL).

ACTION: Notice of open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the ACVETEO. The ACVETEO will discuss the DOL core programs and services that assist veterans seeking employment and raise employer awareness as to the advantages of hiring veterans. There will be an opportunity for individuals or organizations to address the committee. Any individual or organization that wishes to do so should contact Mr. Gregory Green at *ACVETEO@dol.gov.* Additional information regarding the Committee, including its charter, current membership list, annual reports, meeting minutes, and meeting updates may be found at *https://www.dol.gov/agencies/vets/about/advisorycommittee.* This notice also describes the functions of the ACVETEO. This document is intended to notify the general public.

DATES: Tuesday, January 30, 2024 beginning at 12 p.m. and ending at approximately 4 p.m.(EDT).

ADDRESSES: This ACVETEO meeting will be held via TEAMS and teleconference. Meeting information will be posted at the link below under the Meeting Updates tab. *https://www.dol.gov/agencies/vets/about/advisorycommittee.*

Notice of Intent to Attend the Meeting: All meeting participants should submit a notice of intent to attend by Friday, January 19, 2024, via email to Mr. Gregory Green at *ACVETEO@dol.gov,* subject line ''January 2024 ACVETEO Meeting.'' Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistive listening devices, and/or materials in alternative format) should notify the Advisory Committee no later than Friday, January 19, 2024, by contacting Mr. Gregory Green at *ACVETEO@dol.gov.*

Requests made after this date will be reviewed, but availability of the requested accommodations cannot be guaranteed.

FOR FURTHER INFORMATION CONTACT: Mr. Gregory Green, Designated Federal Official for the ACVETEO, *ACVETEO@dol.gov,* (202) 693–4734.

SUPPLEMENTARY INFORMATION: The ACVETEO is a Congressionally mandated advisory committee authorized under Title 38, U.S. Code, Section 4110 and subject to the Federal Advisory Committee Act, 5 U.S.C. 10. The ACVETEO is responsible for: assessing employment and training needs of veterans; determining the extent to which the programs and activities of the U.S. Department of Labor meet these needs; assisting to conduct outreach to employers seeking to hire veterans; making recommendations to the Secretary, through the Assistant Secretary for Veterans' Employment and Training Service, with respect to outreach activities and employment and training needs of veterans; and carrying out such other activities necessary to make required reports and recommendations. The ACVETEO meets at least quarterly.

Agenda

12 p.m. Welcome and remarks, James D. Rodriguez, Assistant Secretary, Veterans' Employment and Training Service

12:05 p.m. Administrative Business, Gregory Green, Designated Federal Official

12:10 p.m. Briefing on Fiscal Year 2024 DOL/VETS Priorities

12:45 p.m. Fiscal Year 2024 Ethics briefing

1:15 p.m. Break

1:30 p.m. Subcommittee Breakout

3:45 p.m. Public Forum, Gregory Green, Designated Federal Official

4 p.m. Adjourn

Signed in Washington, DC, this 21st day of December 2023.

James D. Rodriguez,

Assistant Secretary, Veterans' Employment and Training Service.

[FR Doc. 2023–28691 Filed 12–27–23; 8:45 am]

BILLING CODE 4510–79–P

NATIONAL MEDIATION BOARD

Performance Review Board Appointments

AGENCY: National Mediation Board.

ACTION: Notice of Performance Review Board appointments.

SUMMARY: This notice announces the appointment of those individuals who have been selected to serve as members of the Performance Review Board (PRB). The PRB is comprised of two career senior executives and one non-career executive that will meet annually to review and evaluate performance appraisal documents for all Senior Executive Service (SES) members. The National Mediation Board (NMB) is headed by a three-member board nominated by the President and confirmed by the U.S. Senate. The members self-designate a Chairman, typically on a yearly basis. Members may continue to serve after their three-year terms are up if they are not replaced. The PRB provides a written recommendation to the appointing authority. The current Board Chairman or Acting Board Chairman is the appointing authority for the National Mediation Board for final approval of each SES and SL performance rating, performance-based pay adjustment, and performance award.

DATES: *Applicable date:* These appointments were effective on December 15, 2023.

FOR FURTHER INFORMATION CONTACT:

Michael Jerger, Chief Financial Officer, National Mediation Board, 1301 K St NW, #250E, Washington, DC 20005. Office: (202) 692–5047 | Mobile: (202) 669–2766, Email: *jerger@nmb.gov.*

Morenikeji (Keji) Anjorin, Human Resource Specialist, National Mediation

Board, 1301 K St NW, #250E, Washington, DC 20005, Email: *Morenikeji.Anjorin@NMB.GOV*, Phone: 202 692 5073 | Mobile Phone: 202–440–1759.

SUPPLEMENTARY INFORMATION: The Chairman of the National Mediation Board, has appointed the following individuals to serve on the Board's Performance Review Board (PRB), accordance with 5 U.S.C. 4314(c)(4).

Chairman of the National Mediation Board: Deirdre Hamilton.

SES Members

1. Debra Hall—*Occupational Safety and Health Review Commission* (OSHRC)
2. Nadine Mancini—*Occupational Safety and Health Review Commission* (OSHRC)

Solicitor

3. Fred Jacob—National Labor Relations Board (NLRB)

Accessible Format: On request to the Agency contact persons listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Agency will provide the requestor with an accessible format that may include *Adobe* Acrobat Pro (PDF), Word, or Excel.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Morenikeji Anjorin,

Human Resource Specialist, National Mediation Board.

[FR Doc. 2023–28667 Filed 12–27–23; 8:45 am]

BILLING CODE 7550–01–P

NATIONAL SCIENCE FOUNDATION

Astronomy and Astrophysics Advisory Committee; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Astronomy and Astrophysics Advisory Committee (#13883).

Date and Time: February 23, 2024, 12:00 p.m.–4:00 p.m.

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314, (Teleconference).

Attendance information for the meeting will be forthcoming on the AAAC website: *https://www.nsf.gov/mps/ast/aaac.jsp*.

Type of Meeting: Open.

Contact Person: Dr. Carrie Black, Program Director, Division of Astronomical Sciences, Suite W 9188, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; Telephone: 703–292–2426.

Purpose of Meeting: To provide advice and recommendations to the National Science Foundation (NSF), the National Aeronautics and Space Administration (NASA) and the U.S. Department of Energy (DOE) on issues within the field of astronomy and astrophysics that are of mutual interest and concern to the agencies. To prepare the annual report.

Agenda: To hear presentations of current programming by representatives from NSF, NASA, DOE and other agencies relevant to astronomy and astrophysics; to discuss current and potential areas of cooperation between the agencies; to formulate recommendations for continued and new areas of cooperation and mechanisms for achieving them.

Dated: December 21, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023–28715 Filed 12–27–23; 8:45 am]

BILLING CODE 7555–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–130 and CP2024–136]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 2, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633,

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2024–130 and CP2024–136; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 38 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 21, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* January 2, 2024.

This Notice will be published in the **Federal Register**.

Jennie L. Jbara,

Alternate Certifying Officer.

[FR Doc. 2023–28651 Filed 12–27–23; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99217; File No. SR–CboeBZX–2023–104]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Fees Schedule Related to Physical Port Fees

December 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 12, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (''BZX Options'') relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's equities platform (BZX Equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBZX–2023–047). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeBZX–2023–068. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeBZX–2023–79). On October 13, 2023, the Exchange withdrew that filing and submitted SR–CboeBZX–2023–083. On December 12, 2023 the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any options product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 17 registered options exchanges that trade options (13 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 20% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, MIAX Emerald LLC, and most recently, MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 61 members that trade options, Cboe EDGX has 51 members that trade options, and Cboe C2 has 52 Trading Permit Holders (''TPHs'') (*i.e.,* members). There is also no firm that is a Member of BZX Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[19] The

[10] *See* Securities and Exchange Release No. 83429 (June 14, 2018), 83 FR 28685 (June 20, 2018) (SR–CboeBZX–2018–038).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (October 13, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as

Continued

Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[20] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[21] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gb port (*i.e.,* use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). This is similar to cell phone carriers offering a new iPhone at a discount (or even at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitve rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[22]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 13 non-Cboe affiliated options markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [23] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [24] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the

distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[20] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (nasdaqtrader.com); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[21] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[22] *See e.g., See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[23] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[24] 15 U.S.C. 78f(b)(5).

purposes of this chapter.'' [25] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[26] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 13 non-Cboe affiliated options markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [27] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission*, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[28] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [29] and paragraph (f) of Rule 19b–4 [30] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–104 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2023–104. This file number should be included on the subject line if email is used. To help the Commission process and review your

[25] 15 U.S.C. 78f(8).

[26] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

[27] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[28] *NetCoalition* v. *SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[29] 15 U.S.C. 78s(b)(3)(A).

[30] 17 CFR 240.19b–4(f).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–104 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Christina Z. Milnor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99232; File No. SR–EMERALD–2023–31]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 517, Quote Types Defined

December 22, 2023.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2023, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 517, Quote Types Defined.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/emerald-options/rule-filings,* at MIAX Emerald's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 517, Quote Types Defined. Specifically, the Exchange proposes to adopt new Interpretations and Policies .02 to Rule 517 to adopt new risk protection behavior for replacement Standard quotes[3] that are rejected.

Background

Market Makers[4] on the Exchange have heightened obligations separate from other market participants. Transactions of a Market Maker should constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids[5] or offers[6] or enter into transactions that are inconsistent with such a course of dealings.[7] A quotation may only be entered by a Market Maker, and only in the options classes to which the Market Maker is appointed under Rule 602.[8] A Market Maker's bid and offer for a series of option contracts shall state a price accompanied by the number of contracts at that price the Market Maker is willing to buy or sell upon receipt of an order or upon interaction with a quotation entered by another Market Maker on the Exchange.[9] Additionally, a Market Maker that enters a bid (offer) on the Exchange must enter an offer (bid) within the spread allowable under Rule 603(b)(4).[10]

The Exchange has three classes of Market Makers; Primary Lead Market Makers, Lead Market Makers, and Registered Market Makers.[11] Further, each class of Market Maker has its own separate and distinct quoting obligations. A Primary Lead Market Maker must provide continuous two-sided Standard quotes, which for the purpose of paragraph (e)(1)(i) of Rule 604 shall mean 90% of the time, for the options classes to which it is appointed.[12] A Primary Lead Market Maker must provide continuous two-sided Standard quotes in at least the lesser of 99% of the non-adjusted option series, or 100% of the non-adjusted option series minus one put-call pair, in each class in which the Primary Lead Market Maker is assigned.[13] A Lead Market Maker must provide continuous two-sided Standard quotes, which for the purpose of paragraph (e)(2)(i) of Rule 604 shall mean 90% of the time, for the options classes to which it is appointed.[14] A Lead Market Maker must provide continuous two-sided Standard quotes in at least 90% of the non-adjusted option series in each of its appointed classes. Such quotations must meet the bid/ask differential requirements of Rule 603(b)(4).[15] A Registered Market Maker must provide continuous two-sided Standard quotes throughout the trading day in 60% of the non-adjusted series that have a time

[31] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Standard quote is a quote submitted by a Market Maker that cancels and replaces the Market Maker's previous Standard quote, if any. *See* Exchange Rule 517(a)(1).

[4] The term ''Market Makers'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' collectively. *See* Exchange Rule 100.

[5] The term ''bid'' means a limit order or quote to buy one or more option contracts. *See* Exchange Rule 100.

[6] The term ''offer'' means a limit order or quote to sell one or more option contracts. *See* Exchange Rule 100.

[7] *See* Exchange Rule 603(a).

[8] *See* Exchange Rule 604(a).

[9] *See* Exchange Rule 604(b).

[10] *See* Exchange Rule 604(c).

[11] *See supra* note 4.

[12] *See* Exchange Rule 604(e)(1)(i).

[13] *See* Exchange Rule 604(e)(1)(ii).

[14] *See* Exchange Rule 604(e)(2)(i).

[15] *See* Exchange Rule 604(e)(2)(ii).

to expiration of less than nine months in each of its appointed classes. For the purpose of paragraph (e)(3)(i) of Rule 604, continuous two-sided quoting shall mean 90% of the time, for the options classes to which the Registered Market Maker is appointed.[16]

The Exchange offers several features to Market Makers designed to mitigate potential risks unique to Market Makers given their obligations on the Exchange. For example, the Exchange offers an Aggregate Risk Manager (''ARM'') protection which provides that the MIAX System [17] will maintain a counting program (''counting program'') for each Market Maker who is required to submit continuous two-sided quotations pursuant to Rule 604 in each of their appointed option classes.[18] The System will engage the Aggregate Risk Manager in a particular option class when the counting program has determined that a Market Maker has traded during the specified time period a number of contracts equal to or above their Allowable Engagement Percentage. The Aggregate Risk Manager will then automatically remove the Market Maker's Standard quotations from the Exchange's disseminated quotation in all series of that particular option class until the Market Maker sends a notification to the System of the intent to reengage quoting and submits a new revised quotation.[19]

Additionally, the Exchange offers Market Makers Single Side Protection (''SSP'') functionality which provides that, if the full remaining size of a Market Maker's complex Standard quote or cIOC eQuote in a strategy is exhausted by a trade, the System will trigger the SSP for the traded side of the strategy. When triggered, the System will cancel all complex Standard quotes and block all new inbound complex Standard quotes and cIOC eQuotes for that particular side of that strategy for that MPID.[20]

Proposal

The Exchange now proposes to cancel a Market Maker's Standard quote in certain scenarios when a replacement Standard quote submitted by the Market Maker is rejected. Specifically, the Exchange proposes to adopt new Interpretations and Policies .02 to Exchange Rule 517 which will provide that a replacement Standard quote that is rejected for a technical reason (as described below) will still cancel the target Standard quote.

A Standard quote is submitted by the Market Maker to the Exchange using the MIAX Express Interface (''MEI''). MEI is a messaging interface that MIAX members that are approved as Market Makers use to submit quotes for trading on the MIAX Options market. Market Makers are only allowed to submit quotes in the products of underlying instruments to which they are assigned.[21] Each message submitted to the Exchange via the MEI must pass a number of validity checks that are performed by the System. These include, but are not limited to, price and size checks. Specifically, Standard quote prices must not (i) be less than zero; (ii) exceed the maximum price; and (iii) must comply with the minimum trade increment [22] for that class.[23] Additionally, Standard quote sizes must not be less than zero and must not be less than the minimum quote size as defined in Rule 604(b)(2).[24] Collectively, these requirements constitute the technical reasons for which a replacement Standard quote may be rejected, but which will still result in the cancellation of the target Standard quote under the Exchange's proposal.

The Exchange believes that removing the Standard quote that the Market Maker was attempting to alter promotes the quality of the Exchange's market as removing a Standard quote that was targeted for replacement but was not replaced due to a technical reason maintains the integrity of quotes available in the market by ensuring that all available quotes accurately represent Market Maker interest.

When a Market Maker's replacement Standard quote is rejected because of a technical reason the existing Standard quote will be cancelled by the Exchange. In addition to maintaining the integrity of the Exchange's market, the Exchange believes this functionality also provides an additional level of risk protection to Market Makers that are attempting to replace an existing Standard quote but are unable to as a result of a technical reason with the replacement Standard quote.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[25] Specifically, the Exchange believes that its proposed rule change is consistent with Section 6(b)(5) [26] requirements in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section (6)(b)(5) [27] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as the proposed rule will be uniformly applied to all Standard quote messages submitted by Market Makers on the Exchange.

The Exchange believes its proposal promotes just and equitable principles of trade and removes impediments to and perfects the mechanisms of a free and open market and a national market system as removing a Market Maker's Standard quote that the Market Maker has targeted for replacement, but failed to replace due to a technical reason with the replacement Standard quote message, promotes the quality of the Exchange's market by ensuring that all available quotes accurately represent Market Maker interest. When a Market Maker enters a replacement Standard quote a Market Maker has an expectation that the existing Standard quote will be cancelled, currently the existing Standard quote that the Market Maker intended to cancel may be executed if the replacement Standard quote is rejected which is contrary to the Market Maker's intent.

[16] *See* Exchange Rule 604(e)(3)(i).

[17] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[18] *See* Exchange Rule 612.

[19] *See* Exchange Rule 612(b)(1).

[20] *See* Exchange Rule 532(b)(8).

[21] *See* MIAX Emerald Options Exchange, Express Interface for Quoting and Trading Options, MEI Interface Specification, version 2.2 (7/28/2023), available at: *https://www.miaxglobal.com/markets/us-options/emerald-options/interface-specifications.*

[22] The price of Market Maker quotes shall be in the minimum trading increments applicable to the security under Rule 510. *See* Exchange Rule 604(b)(1).

[23] The terms ''class of options'' or ''option class'' mean all option contracts covering the same underlying security. *See* Exchange Rule 100.

[24] Exchange Rule 604(b)(2) provides that, the initial size of a Market Maker incoming Standard Quote and all other types of eQuotes must be for the minimum number of contracts, which minimum number shall be at least one (1) contract. The minimum number of contracts, which can vary according to type of quote or eQuote, shall be at least one (1) contract, will be determined by the Exchange on a class-by-class basis and announced to the Members through a Regulatory Circular.

[25] 15 U.S.C. 78f(b).

[26] 15 U.S.C. 78f(b)(5).

[27] *See id.*

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe that its proposed rule change will impose any burden on intra-market competition as the Rules of the Exchange apply equally to all Market Makers of the Exchange and all Market Makers that submit a replacement Standard quote that is rejected as a result of a technical reason will have the existing target Standard quote removed by the Exchange.

The Exchange does not believe that its proposed rule change will impose any burden on inter-market competition, as the Exchange's proposal is not a competitive filing. Rather the Exchange believes that its proposal may promote inter-market competition, as the Exchange's proposal will improve market quality on the Exchange which may improve competition for orders across all exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [28] and subparagraph (f)(6) of Rule 19b 4 thereunder.[29]

A proposed rule change filed under Rule 19b–4(f)(6) [30] normally does not become operative prior to 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii),[31] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Exchange requested the waiver because it would ensure the integrity of quotes available in the market. The Exchange stated that the Exchange provides risk protection functionality specifically for Market Makers due to the heightened obligations that Market Makers have on the Exchange and that the proposed rule change would ensure that the quotes available in the marketplace accurately represent Market Maker interest. In addition, the Commission notes that the proposed rule change is substantively identical to a recent proposed rule change filed by another national securities exchange that is now operative.[32] For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[33]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–EMERALD–2023–31 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–EMERALD–2023–31. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–EMERALD–2023–31 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Christina Z. Milnor,

Assistant Secretary.

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[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b 4(f)(6). In addition, Rule 19b 4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[30] 17 CFR 240.19b–4(f)(6).

[31] 17 CFR 240.19b–4(f)(6)(iii).

[32] *See* Securities Exchange Act Release No. 99041 (November 29, 2023), 88 FR 84376 (December 5, 2023) (SR–MIAX–2023–45); *see also* Interpretations and Policies .02 of MIAX Options Exchange Rule 517.

[33] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[34] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99223; File No. SR–CboeEDGA–2023–022]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

December 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 12, 2023, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Cboe BZX Exchange, Inc. (options and equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGA–2023–011). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGA–2023–015. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeEDGA–2023–016). On October 13, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGA–2023–017. On December 12 2023, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83449 (June 15, 2018), 83 FR 28890 (June 21, 2018) (SR–CboeEDGA–2018–010).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets which does not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 103 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe BYX has 110 members and Cboe BZX has 132 members. There is also no firm that is a Member of EDGA Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[18] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (*nasdaqtrader.com*); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gbps port (*i.e.,* use one single 10 Gbps port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). This is similar to cell phone carriers offering a new iPhone at a discount (or even at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitve rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [22] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [23] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [24] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[25] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[21] *See e.g., See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[22] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(8).

[25] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 12 non-Cboe affiliated equities markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [26] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[27] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [28] and paragraph (f) of Rule 19b–4 [29] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGA–2023–022 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGA–2023–022. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication

[26] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[27] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f).

submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGA–2023–022 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28609 Filed 12–27–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99224; File No. SR–CboeBZX–2023–102]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 11.22 To Introduce a New Data Product To Be Known as the Short Interest Report

December 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 11, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') proposes to amend Rule 11.22 to introduce a new data product to be known as the Short Interest Report. The text of the proposed rule change is provided below.

(additions are *italicized;* deletions are [bracketed])

* * * * *

Rules of Cboe BZX Exchange, Inc.

* * * * *

Rule 11.22. Data Products

The Exchange offers the following data products free of charge, except as otherwise noted in the Exchange's fee schedule:

(a)–(m) No change.

(n) Short Interest Report. The Short Interest Report contains a summary of consolidated market short interest positions in all BZX-listed securities.

* * * * *

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 11.22 to adopt new subparagraph (n) to include the Short Interest Report as an Exchange data product.

The Exchange currently makes available via its website, without charge, a Short Interest Report.[5] By way of background, pursuant to the Financial Industry Regulatory Authority, Inc. (''FINRA'') Rule 4560, each FINRA member firm is required to report its ''total'' short interest positions in all customer and proprietary firm accounts.[6] FINRA uses the short interest data to, among other things, assess its members' short selling activity and compliance with Regulation SHO. The short interest data provided by FINRA members also provides analytical and investment data that the brokerage industry, academic institutions and investors use in developing risk-assessment tools and trading models.

The Short Interest Report that the Exchange currently makes available is a summary of consolidated market short interest positions in all BZX-listed securities [7] only as reported by FINRA. The file is provided daily, for each business day, but values are only updated twice per month.

Proposed Rule 11.22(n) provides that the Short Interest Report contains a summary of consolidated market short interest positions in all BZX-listed securities. The report data fields include Cycle Settlement Date,[8] BATS-Symbol,[9] Security Name, Number of Shares Net Short Current Cycle,[10] Number of Shares Net Short Previous Cycle,[11] Cycle Average Daily Trade Volume,[12] Minimum Number of Trade Days to Cover Shorts,[13] Split Indicator,[14] Manual Revision Indicator,[15] Percent Change in Short Position,[16] and Change in Short Position from Previous.[17]

Cboe LiveVol, LLC (''LiveVol''), a wholly owned subsidiary of the Exchange's parent company, Cboe Global Markets, Inc., will make the Short Interest Reports available for purchase [18] to Members and non-Members on the LiveVol DataShop website.[19]

The Exchange notes that the data fields included in the Short Interest Report are substantially similar to the

[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *https://www.cboe.com/us/equities/market_statistics/short_interest/*

[6] *See* FINRA Rule 4560.

[7] A BZX-listed security is a security listed on the Exchange pursuant to Chapter 14 of the Exchange's Rules and includes both corporate listed securities and Exchange Traded Products (''ETPs'').

[8] ''Cycle Settlement Date'' is the reporting period date.

[9] ''BATS-Symbol'' is the Exchange-assigned symbol for the given security.

[10] ''Number Shares Net Short Current Cycle'' is the total of uncovered open short interest positions in a particular security in shares, for the current reporting period.

[11] ''Number of Shares Net Short Previous Cycle'' is the total number of uncovered open short interest positions in a particular security in shares, for the previous reporting period.

[12] ''Cycle Average Daily Trade Volume'' is the number of shares traded on average per day in a particular security in shares.

[13] ''Minimum Number of Trade Days to Cover Shorts'' is the ratio of the current short interest position over the average daily volume for the current settlement date.

[14] ''Split Indicator'' indicates whether the security has undergone a stock split during the current reporting period.

[15] ''Manual Revision Indicator'' indicates whether the security's short interest for the previous reporting period has been revised.

[16] ''Percent Change in Short Position'' is the percent change from the current reporting period's short interest compared to the previous reporting period's short interest.

[17] ''Change in Short Position from Previous'' is the difference between the current and previous reporting period of uncovered short interest positions in a particular security in shares.

[18] The Exchange intends to submit a separate filing to establish fees for the Short Interest Report.

[19] *See https://datashop.cboe.com/.*

fields included by the Nasdaq Stock Market LLC (''Nasdaq'') [20] and the New York Stock Exchange LLC (''NYSE'') [21] in their Short Interest Report files. Specifically, the Nasdaq Short Interest Report file also includes Security Name and Symbol, Current Shares Short, Previous Month Shares Short, Change in Shares Short, Percent Change, Average Daily Share Volume, Days to Cover, and Stock Split Flag, and New Issue Flag.[22] The proposed Short Interest Report is also similar to NYSE's Short Interest Report file, which includes Stock Symbol and Standard Suffix, Issue Name, Revision Indicator, Split Indicator Current Short Interest Position, Previous Short Interest Position, Change in Short Interest Position, Average Daily Volume, and Current Days to Cover.[23] Accordingly, the data fields included in the Short Interest Report are nearly identical to the fields included by Nasdaq and NYSE in their respective short interest reports, except that the Exchange will not include one field that appears within the Nasdaq report (*i.e.,* the New Issue Flag) and three fields that appear within the NYSE report (*i.e.,* the Change in Days to Cover, Free Float and Change in Average Daily Volume). The Exchange's proposed Short Interest Report will include only data points provided by FINRA, and as the foregoing fields are not included in the FINRA-provided data points, the Exchange will not include such fields in the report. Additionally, like NYSE, the Exchange will offer historical Short Interest Reports, dating back to March 31, 2015, which will include the same data fields as the daily end-of-day files.

The Exchange anticipates that a wide variety of market participants will purchase the proposed Short Interest Report, including, but not limited to, active equity trading firms and academic institutions. For example, the Exchange notes that academic institutions may utilize the Short Interest Report data and as a result promote research and studies of the equities industry to the benefit of all market participants. The Exchange further believes the proposed Short Interest Report may provide helpful trading information regarding investor sentiment that may allow market participants to make more informed trading decisions and may be used to create and test trading models and analytical strategies and provide comprehensive insight into trading on the Exchange. The proposal is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may purchase it only if they voluntarily choose to do so.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[24] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [25] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [26] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed Short Interest Report, which supplies data on short interest positions for all BZX-listed securities as reported by FINRA, broadens the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The proposal also promotes transparency through the dissemination of short interest data. The proposed rule change would benefit investors by providing access to the Short Interest Report data, which may promote better informed trading, as well as research and studies of the equities industry. Further, data products such as the Short Interest Report are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they provide. The need to compete for order flow places substantial pressure upon exchanges to keep their market data offerings competitive.

Moreover, as noted above, Nasdaq offers a Short Interest file which provides short interest data that is nearly identical to that currently proposed by the Exchange.[27] The proposed Short Interest Report is also nearly identical to NYSE's Short Interest file.[28] As stated previously, the Exchange's Short Interest Report is nearly identical to the NYSE and Nasdaq reports in that the Exchange will offer identical data fields except that the Exchange will not include one field that appears within the Nasdaq report (*i.e.,* the New Issue Flag) and three fields that appear within the NYSE report (*i.e.,* the Change in Days to Cover, Free Float and Change in Average Daily Volume). As noted above, the Exchange's report will include data points provided by FINRA, and the foregoing Nasdaq and NYSE fields are not included in the FINRA-provided data points. Accordingly, the proposed Short Interest Report does not provide a unique or novel data offering, but rather offers data points consistent with other data products already available and utilized by market participants today.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote fair competition among the national securities exchanges by permitting the Exchange to offer a data product that provides substantially the same data offered by other competitor equities exchanges, with the only difference, as noted above, being that the Exchange's report not include fields outside of those provided by FINRA.

Additionally, the Exchange believes the proposed rule change does not impose any burden on intramarket

[20] *See* Specifications for Short Interest file, available at: *https://www.nasdaq.com/solutions/short-interest-report.*

[21] *See* NYSE Group Short Interest Client Specification, available at: NYSE_Group_Short_Interest_Client_Specification_v1.5.pdf. Unlike NYSE, the proposed Short Volume Report will not include the trading exchange, as the proposed report includes short interest information only for transactions executed on BZX.

[22] *See supra* note 20.

[23] *See supra* note 21.

[24] 15 U.S.C. 78f(b).

[25] 15 U.S.C. 78f(b)(5).

[26] *Id.*

[27] *See supra* note 20.

[28] *See supra* note 21.

competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Short Interest Report will be available equally to Members and non-Members. Market participants are not required to purchase the Short Interest Report, and the Exchange is not required to make the Short Interest Report available to investors. Rather, the Exchange is voluntarily making the Short Interest Report available, and market participants may choose to receive (and pay for) this data based on their own business needs. Potential purchasers may request the data at any time if they believe it to be valuable or may decline to purchase such data. Given the above, the Exchange does not believe the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange also believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Moreover, as noted above, Nasdaq offers a Short Interest file which provides short interest data that is nearly identical to that currently proposed by the Exchange.[29] The proposed Short Interest Report is also nearly identical to NYSE's Short Interest file.[30] As stated previously, the Exchange's Short Interest Report is nearly identical to the NYSE and Nasdaq reports in that the Exchange will offer identical data fields except that the Exchange will not include one field that appears within the Nasdaq report (*i.e.,* the New Issue Flag) and three fields that appear within the NYSE report (*i.e.,* the Change in Days to Cover, Free Float and Change in Average Daily Volume). As noted above, the Exchange's report will include data points provided by FINRA, and the foregoing Nasdaq and NYSE fields are not included in the FINRA-provided data points. Accordingly, the proposed Short Interest Report does not provide a unique or novel data offering, but rather offers data points consistent with other data products already available and utilized by market participants today.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

[29] *See supra* note 20.

[30] *See supra* note 21.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act [31] and Rule 19b–4(f)(6) [32] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [33] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[34] the Commission may designate a shorter time of such action is consistent with the protection of investor and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange states that waiving the operative delay would allow market participants to realize immediately the benefits of the proposal, which the Exchange states includes trading information regarding investor sentiment that may allow market participants to make more informed trading decisions. The proposed change raises no novel legal or regulatory issues. Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CboeBZX–2023–102 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2023–102. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–102 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Christina Z. Milnor,

Assistant Secretary.

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[31] 15 U.S.C. 78s(b)(3)(A).

[32] 17 CFR 240.19b–4(f)(6).

[33] 17 CFR 240.19b–4(f)(6).

[34] 17 CFR 240.19b–4(f)(6).

[35] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99218; File No. SR–CboeBYX–2023–019]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

December 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 12, 2023, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/byx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Cboe BZX Exchange, Inc. (options and equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBYX–2023–010). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeBYX–2023–013. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeBYX–2023–014). On October 13, 2023, the Exchange withdrew that filing and submitted SR–CboeBYX–2023–015. On December 12, 2023, Exchange filed the proposed fee change (SR–CboeBYX–2023–018). On December 12, 2023, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83441 (June 14, 2018), 83 FR 28684 (June 20, 2018) (SR–CboeBYX–2018–006).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 110 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe EDGA has 103 members and Cboe BZX has 132 members. There is also no firm that is a Member of BYX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[18] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership,.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (*nasdaqtrader.com*); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gb port (*i.e.,* use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relate to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). This is similar to cell phone carriers offering a new iPhone at a discount (or even at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitve rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [22] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [23] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [24] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[25] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[21] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[22] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(8).

[25] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 12 non-Cboe affiliated equities markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [26] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission*, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[27] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [28] and paragraph (f) of Rule 19b–4 [29] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBYX–2023–019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBYX–2023–019. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or

[26] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[27] *NetCoalition* v. *SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f).

subject to copyright protection. All submissions should refer to file number SR–CboeBYX–2023–019 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28604 Filed 12–27–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99234; File No. SR–DTC–2023–013]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Proposed Rule Change To Modify the DTC Settlement Service Guide

December 22, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 20, 2023, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change[3] consists of amendments to the DTC Settlement Service Guide (''Settlement Guide'')[4] to increase the amount of the maximum Net Debit Cap for individual Participants,[5] as described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would modify the Settlement Guide to increase the amount of the maximum Net Debit Cap for individual Participants, as described below.

Background

Through its settlement services, DTC provides book-entry transfer and pledge of interests in Eligible Securities and end-of-day net funds settlement. DTC maintains a liquidity structure designed to facilitate its maintenance of sufficient financial resources to complete settlement each business day notwithstanding the failure to settle of a defaulting Participant, or Affiliated Family of Participants,[6] with the largest settlement obligation. In this regard, the Collateral Monitor[7] and Net Debit Cap risk controls are employed by DTC to provide that each Delivery Versus Payment[8] is contingent on the Participant that is the Receiver[9] satisfying its end-of-day net settlement obligation, if any.

The Collateral Monitor prevents the completion of transactions that would cause a Participant's Net Debit Balance to exceed the value of Collateral in its account.[10] In this regard, the settlement obligation of each Participant must be fully collateralized, based on the Collateral Monitor, which is DTC's process for measuring the sufficiency of the Collateral in a Participant's account to cover the Participant's net settlement obligation.[11] This is designed so if a Participant fails to pay for its settlement obligation, DTC will have sufficient Collateral to obtain funding for settlement.

The Net Debit Cap limits the Net Debit Balance that each Participant can incur to an amount, based upon activity level, which would be covered by DTC's liquidity resources. The Net Debit Cap is structured so that DTC will have sufficient liquidity to complete settlement should any single Participant or Participant family fail to settle. The Net Debit Cap limits the Net Debit Balance of an individual Participant at any point during DTC's processing day.[12] The Aggregate Affiliated Family Net Debit Cap[13] limits the sum of Net

[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Each capitalized term not otherwise defined herein has its respective meaning as set forth the Rules, By-Laws and Organization Certificate of DTC (the ''Rules''), *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.*

[4] *Available at https://www.dtcc.com/-/media/Files/Downloads/legal/service-guides/Settlement.pdf.* The Settlement Guide is a Procedure of DTC. Pursuant to the Rules, the term ''Procedures'' means the Procedures, service guides, and regulations of DTC adopted pursuant to Rule 27, as amended from time to time. *See* Rule 1, Section 1, *supra* note 3. Procedures are binding on DTC and each Participant in the same manner that they are bound by the Rules. *See* Rule 27, *supra* note 3.

[5] Pursuant to Rule 1, *supra* note 3, the term ''Net Debit Cap'' of a Participant means an amount determined by the Corporation in the manner specified in the Procedures; provided, however, that the maximum Net Debit Cap of the Participant shall be the least of (i) a maximum amount applicable to all Participants based on the liquidity resources of the Corporation, (ii) the Settling Bank Net Debit Cap applicable to such Participant, or (iii) any other amount determined by the Corporation, in its sole discretion.

[6] Pursuant to Rule 1, *supra* note 3, the term ''Affiliated Family'' means each Participant that controls or is controlled by another Participant and each Participant that is under the common control of any Person. For purposes of this definition, ''control'' means the direct or indirect ownership of more than 50% of the voting securities or other voting interests of any Person.

[7] Pursuant to Rule 1, *supra* note 3, the term ''Collateral Monitor'' of a Participant, as used with respect to its obligations to the Corporation, means, on any Business Day, the record maintained by the Corporation for the Participant which records, in the manner specified in Procedures, the algebraic sum of (i) the Net Credit or Debit Balance of the Participant and (ii) the aggregate Collateral Value of the Collateral of the Participant.

[8] Pursuant to Rule 1, *supra* note 3, the term ''Delivery Versus Payment'' means a Delivery against a settlement debit to the Account of the Receiver, as provided in Rule 9(A) and Rule 9(B) and as specified in the Procedures.

[9] Pursuant to Rule 1, *supra* note 3, the term ''Receiver'', as used with respect to a Delivery of a Security, means the Person which receives the Security.

[10] Pursuant to Rule 1, *supra* note 3, the term ''Collateral'' of a Participant, as used with respect to its obligations to the Corporation, means, on any Business Day, the sum of (i) the Actual Participants Fund Deposit of the Participant, (ii) the Actual Preferred Stock Investment of a Participant, (iii) all Net Additions of the Participant and (iv) any settlement progress payments (''SPP'') wired by the Participant to the account of the Corporation at the Federal Reserve Bank of New York in the manner specified in the Procedures. A SPP is Collateral that increases a Participant's Collateral Monitor, but also reduces a Participant's Net Debit Balance. *See* Settlement Guide, *supra* note 4, at 73. Instructions for submission of a SPP are provided in the Settlement Guide. *See* Settlement Guide, *supra* note 4, at 69. Pursuant to Rule 1, *supra* note 3, the term ''Net Debit Balance'' of a Participant means the amount by which the Gross Debit Balance of the Participant exceeds its Gross Credit Balance. *Id.* The term ''Gross Credit Balance'' of a Participant on any Business Day means the aggregate amount of money the Corporation credits to all the Accounts in all the Account Families of the Participant without accounting for any amount of money the Corporation debits or charges thereto. *Id.* The term ''Gross Debit Balance'' of a Participant on any Business Day means the aggregate amount of money the Corporation debits or charges to all the Accounts in all the Account Families of the Participant without accounting for any amount of money the Corporation credits thereto. *Id.*

[11] *See* Settlement Guide, *supra* note 4, at 5 and 72.

[12] *See* Settlement Guide, *supra* note 4, at 6.

[13] Pursuant to Rule 1, *supra* note 3, the term ''Aggregate Affiliated Family Net Debit Cap'' means the sum of the Net Debit Caps for the Participants that are part of an Affiliated Family in the manner

Debit Balances an Affiliated Family of Participants at any point during the processing day [sic]. The Net Debit Cap of each Participant and the Aggregate Affiliated Family Net Debit Cap of each Affiliated Family of Participants are each set to an amount at or below DTC's liquidity resources.[14]

DTC maintains two key liquidity resources that are considered ''qualifying liquid resources,'' as defined by Rule 17Ad–22(a)(14) promulgated under the Act: [15] specifically, (i) Required Participants Fund Deposits across all Participants of $1.15 BN and (ii) a committed line of credit facility (''LOC'') of $1.9 BN, to which DTC may pledge Securities that are Collateral of the defaulting Participant in order to complete settlement.

Taken together, the Participants Fund and line of credit provide DTC with $3.05 BN in total liquidity resources.

Current Net Debit Cap Amounts

As noted above, the Net Debit Cap for an individual Participant is $1.80 BN. DTC has established the maximum Aggregate Affiliated Family Net Debit Cap at $2.85 BN, which is below DTC's total available liquidity resources maintained by DTC to account for the possibility that a defaulting Participant that is part of an Affiliated Family may be a lender to the line of credit.

Together, the Net Debit Cap and Aggregate Affiliated Family Net Debit Cap control the total settlement obligation that any Participant or Affiliated Family, respectively, may incur. Any transaction that would cause a Participant or an Affiliated Family to exceed its Net Debit Cap or Aggregate Affiliated Family Net Debit Cap, as applicable, will not be processed.[16] Instead, the transaction will remain in a pending status until the Net Debit Balance is reduced sufficiently to allow processing.[17] The Net Debit Balance may be reduced during the processing day by, among other things, receipt of a Delivery Versus Payment, which generates credits to the Participant's settlement account, or by a SPP, which are funds that may be wired to DTC during the processing day, in order to avoid a Participant having its receipts of Securities blocked by its Net Debit Cap. To reduce transaction blockage and the need to make SPPs, Participants have requested that DTC raise the maximum Net Debit Cap.

Proposed Increase of the Net Debit Cap

DTC proposes to increase the maximum Net Debit Cap for an individual Participant from $1.80 BN to $2.15 BN. (DTC is not proposing to change the maximum Aggregate Affiliated Family Net Debit Cap of $2.85 BN.) The proposed increase of $350 MM is supported by available liquidity resources from the $450 MM Core Fund,[18] to which all Participants contribute, and the $1.90 BN LOC, which is collectively $2.35 BN.[19] Proposing to raise the maximum Net Debit Cap for an individual Participant to $2.15 BN and not $2.35 BN allows for a $200 MM buffer to account for the possibility that a defaulted Participant may also be a lender to the LOC.[20]

The proposed maximum Net Debit Cap increase better aligns the maximum Net Debit Cap for an individual Participant with DTC's available liquidity resources, as described above.

DTC expects that increasing the maximum Net Debit Cap would benefit Participants generally. An impact study (''Impact Study'') conducted by DTC for the period January 3, 2022, through December 30, 2022, showed that a number of Participants that are currently capped at a $1.80 BN Net Debit Cap would realize an immediate benefit from the proposed Net Debit Cap increase. The liquidity needs across legal entities were determined by looking at Participants reaching 90% of the current $1.80 BN maximum Net Debit Cap, identifying the transactions pending under Net Debit Cap limits, and any incoming SPPs. By increasing the maximum Net Debit Cap, the proposed rule change would help improve transaction processing by enabling more transactions to process without the need for a Receiving Participant to wait for Delivery Versus Payment credits or submit SPPs to reduce its intraday Net Debit Balance. Moreover, any Participant that is a Deliverer of a Delivery Versus Payment may see less of its Deliveries pend because the Receiver may maintain a higher Net Debit Cap. Meanwhile, as described above, the proposed Net Debit Cap increase would continue to be supported by adequate DTC liquidity resources available to complete system-wide settlement in the event of a failure to settle by the largest Participant or Affiliated Family.

Proposed Rule Change

Pursuant to the proposed rule change, the Settlement Guide will be revised to reflect the proposed increase to the Net Debit Cap. Specifically, two references to the existing $1.80 BN Net Debit Cap will be revised to reflect the proposed $2.15 BN Net Debit Cap.

Effective Date

DTC would implement the proposed changes no later than 60 Business Days after the approval of the proposed rule change by the Commission.

2. Statutory Basis

Section 17A(b)(3)(F) [21] of the Act requires that the rules of the clearing agency be designed, *inter alia,* to promote the prompt and accurate clearance and settlement of securities transactions. DTC believes the proposed rule change is consistent with the section 17A(b)(3)(F) of the Act.

The Impact Study results indicate that by increasing the maximum Net Debit Cap, as described above, the proposed rule change would help improve transaction processing by enabling more transactions to process without the need for a Receiving Participant to wait for Delivery Versus Payment-related credits or submit SPPs to reduce its intraday Net Debit Balance. Moreover, any Participant that is a Deliverer of a

specified in the Procedures; provided, however, that the maximum Aggregate Affiliated Family Net Debit Cap shall not exceed the total available liquidity resources of the DTC.

[14] To determine a Participant's Net Debit Cap, DTC records the Participant's three highest intraday net debit peaks over a rolling 70-Business Day period. The Participant's average of these net debit peaks is calculated and multiplied by a factor to determine the Participant's Net Debit Cap, but not to exceed $1.80 BN. *See* Settlement Guide, *supra* note 4, at 73. The maximum Net Debit Cap for a Participant was increased to $1.80 BN from $1.5 BN in 2001, to reduce processing blockages relating to increased trading volumes and settlement values. This increase was facilitated by a coinciding increase to DTC's liquidity resources. *See* Securities Exchange Act Release No. 44509 (July 3, 2001), 66 FR 36350 (July 11, 2001) (File No. SR–DTC–2001–09).

[15] 17 CFR 240.17Ad–22(e)(14).

[16] *See* Settlement Guide, *supra* note 4, at 73–74.

[17] *Id.* at 62 and 73. Prior to processing, the transaction must also satisfy the Collateral Monitor risk management control and be approved by the Receiver via the Receiver Authorized Delivery function. *Id.* at 70–72 and 59–60.

[18] The aggregate Participants Fund includes four component amounts, as set forth below: the ''Core Fund,'' the ''Base Fund,'' the ''Incremental Fund'' and the ''Liquidity Fund.'' The Core Fund is set by DTC at an aggregate amount of $450 MM and is comprised of the Base Fund and the Incremental Fund. The Base Fund is the sum of minimum deposits by all Participants, *i.e.,* the amount that is $7,500, times the number of Participants, at any time. The Incremental Fund is the balance of the Core Fund up to $450 MM; this is the amount that must be ratably allocated among Participants that are required to pay more than a minimum deposit, as described in the Settlement Guide. The Liquidity Fund component (set at $700 MM) applies to Participants whose Affiliated Families have Net Debit Caps that exceed $2.15 BN. *See* Settlement Guide, *supra* note 4, at 53–56.

[19] The Liquidity Fund (set at $700 MM) is not included because that amount only applies to Participants whose Affiliated Families have Net Debit Caps that exceed $2.15 BN.

[20] The $200 MM buffer is an amount greater than the contribution of any lender to the DTC LOC.

[21] 15 U.S.C. 78q–1(b)(3)(F).

Delivery Versus Payment may see less of its deliveries pend because the Receiver may maintain a higher Net Debit Cap. Meanwhile, the proposed Net Debit Cap increase would continue to be supported by adequate DTC liquidity resources available to complete system-wide settlement in the event of a failure to settle by the largest Participant or Affiliated Family. Therefore, DTC believes the proposed rule change is consistent with section 17A(b)(3)(F) of the Act, cited above, by helping to promote the prompt and accurate clearance and settlement of securities transactions.

Rule 17Ad–22(e)(7)(i)[22] promulgated under the Act requires, *inter alia,* that DTC, a covered clearing agency, establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, effectively measure, monitor, and manage the liquidity risk that arises in or is borne by the covered clearing agency, including measuring, monitoring, and managing its settlement and funding flows on an ongoing and timely basis, and its use of intraday liquidity by, at a minimum maintaining sufficient liquid resources to effect same-day settlement of payment obligations with a high degree of confidence under a wide range of foreseeable stress scenarios that includes, but is not limited to, the default of the participant family that would generate the largest aggregate payment obligation for the covered clearing agency in extreme but plausible market conditions (*i.e.,* the ''Cover One standard'').

DTC's liquidity needs for settlement are driven by protecting DTC against the possibility that a Participant may fail to pay its settlement obligations on a Business Day. The tools available to DTC under its Rules, including the Net Debit Cap, allow it to regularly test the sufficiency of liquid resources on an intraday and end-of-day basis and adjust to stressed circumstances during a settlement day to protect itself and Participants against liquidity exposure under normal and stressed market conditions. DTC calculates its liquidity needs per Participant (at a legal entity level) and further aggregates these amounts at a family level (that is, including all affiliated Participants, based on the assumption that all such affiliates may fail simultaneously). In this regard, DTC monitors settlement flows and net-debit obligations daily, and its current available liquidity resources are sufficient to satisfy the Cover One standard.

As described above, the proposed rule change would only increase the maximum Net Debit Cap for individual Participants from $1.80 BN to $2.15 BN, which is below DTC's available liquidity when considering the Core Fund and LOC collectively, and it would not otherwise alter the way DTC monitors settlement flows and net-debit obligations. Therefore, DTC believes the proposal is consistent with Rule 17Ad–22(e)(7)(i), cited above, because the proposed increase would remain aligned with DTC's continued maintenance of sufficient liquid resources to satisfy its Cover One standard and not change DTC's monitoring of settlement flows and net-debit obligations.

(B) Clearing Agency's Statement on Burden on Competition

DTC does not believe that the proposed rule change would impose a burden on competition.[23] The proposed rule change would increase the maximum Net Debit Cap from $1.80 BN to $2.15 BN, and would apply to each Participant equally to the extent a Participant's Net Debit Balance, barring the effect of the Net Debit Cap control, could exceed the existing $1.80 BN.

DTC believes the proposed rule change may promote competition because it alleviates the need for some Participants to wait for Delivery Versus Payment credits or submit SPPs for their transactions to process.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC has not received or solicited any written comments relating to this proposal. If any written comments are received, they would be publicly filed as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at *https://www.sec.gov/regulatory-actions/how-to-submitcomments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

DTC reserves the right to not respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–DTC–2023–013 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to file number SR–DTC–2023–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the

[22] 17 CFR 240.17Ad–22(e)(7)(i).

[23] 15 U.S.C. 78q–1(b)(3)(I).

public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (*dtcc.com/legal/sec-rule-filings*). Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–DTC–2023–013 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28706 Filed 12–27–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99220; File No. SR–C2–2023–025]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

December 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 12, 2023, Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2 Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Trading Permit Holders (''TPHs'') and non-TPHs on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gbps'') circuit and $7,500 per physical port for a 10 Gbps circuit. The Exchange proposes to increase the monthly fee for 10 Gbps physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: Cboe BZX Exchange, Inc. (options and equities platforms), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe EDGA Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–C2–2023–014). On September 1, 2023, the Exchange withdrew that filing and submitted SR–C2–2023–020. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–C2–2023–021). On October 13, 2023, the Exchange withdrew that filing and submitted SR–C2–2023–022. On December 12, 2023, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.*, The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

TPHs and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gbps physical ports. Further, the current 10 Gbps physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gbps physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, TPHs are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gbps physical ports and charging a higher fee as compared to the 1 Gbps physical port is equitable as the 1 Gbps physical port is 1/10th the size of the 10 Gbps physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gbps alternative is lower than the value of the 10 Gbps alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gbps physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gbps physical ports is reasonably and appropriately allocated.

The Exchange also notes TPHs and non-TPHs will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a TPH of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any options product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 17 registered options exchanges that trade options (13 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 20% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 4 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, MIAX Emerald LLC, and most recently, MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of anyone options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 52 TPHs, Cboe BZX has 61 members that trade options, and Cboe EDGX has 51 members that trade options. There is also no firm that is a Member of C2 Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-TPHs also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-TPHs and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[19] The

[10] *See* Securities and Exchange Release No. 83455 (June 15, 2018), 83 FR 28892 (June 21, 2018) (SR–C2–2018–014).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (October 13, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are

Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of TPHs that connect to the Exchange indirectly via the third-party).[20] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple TPHs are able to share a single physical port (and corresponding bandwidth) with other non-affiliated TPHs if purchased through a third-party reseller.[21] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gb port (*i.e.,* use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). This is similar to cell phone carriers offering a new iPhone at a discount (or even at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitve rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[22]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 13 non-Cboe affiliated options markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [23] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [24] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on

geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[20] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (*nasdaqtrader.com*); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[21] For example, a third-party reseller may purchase one 10 Gbps physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gbps each and leverage the same single port.

[22] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[23] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[24] 15 U.S.C. 78f(b)(5).

competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [25] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[26] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated TPHs equally (*i.e.,* all market participants that choose to purchase the 10 Gbps physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gbps physical port (which cost is not changing) or may choose to obtain access via a third-party reseller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gbps physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 13 non-Cboe affiliated options markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [27] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission*, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[28] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [29] and paragraph (f) of Rule 19b–4 [30] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–C2–2023–025 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–C2–2023–025. This file number should be included on the subject line if email is used. To help the Commission process and review your

[25] 15 U.S.C. 78f(8).

[26] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

[27] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[28] *NetCoalition* v. *SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[29] 15 U.S.C. 78s(b)(3)(A).

[30] 17 CFR 240.19b–4(f).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–C2–2023–025 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28606 Filed 12–27–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99221; File No. SR–CboeEDGX–2023–080]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

December 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 12, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (''EDGX Options'') relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's equities platform (EDGX Equities), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with

[31] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGX–2023–045). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–058. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeEDGX–2023–063). On October 13, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–064. On December 12, 2023, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any options product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 17 registered options exchanges that trade options (13 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 20% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, MIAX Emerald LLC, and most recently MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 51 members that trade options, Cboe BZX has 61 members that trade options, and Cboe C2 has 52 Trading Permit Holders (''TPHs'') (*i.e.,* members). There is also no firm that is a Member of EDGX Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members[17] and MIAX Pearl Options has 40 members.[18]

A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83430 (June 14, 2018), 83 FR 28697 (June 20, 2018) (SR–CboeEDGX–2018–017).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (October 13, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[19] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[20] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[21] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gb port (*i.e.,* use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Therefore given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitve rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[22]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 13 non-Cboe affiliated options markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [23] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''to remove impediments to and perfect the mechanism of a free and open market and a national market system,

[19] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[20] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (*nasdaqtrader.com*); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[21] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[22] *See e.g., See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[23] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

and, in general, to protect investors and the public interest.'' [24] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [25] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[26] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e., all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 13 non-Cboe affiliated options markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [27] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .''.[28] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [29] and paragraph (f) of Rule 19b–4 [30] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGX–2023–080 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

[24] 15 U.S.C. 78f(b)(5).

[25] 15 U.S.C. 78f(8).

[26] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

[27] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[28] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[29] 15 U.S.C. 78s(b)(3)(A).

[30] 17 CFR 240.19b–4(f).

Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGX–2023–080. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–080 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28607 Filed 12–27–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35081; File No. 812–15530]

Nuveen Enhanced Floating Rate Income Fund, et al.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of application for an order under sections 6(c) and 23(c)(3) of the Investment Company Act of 1940 (the ''Act'') for an exemption from rule 23c–3 under the Act.

SUMMARY OF APPLICATION: Applicants request an order under sections 6(c) and 23(c)(3) of the Act for an exemption from certain provisions of rule 23c–3 to permit certain registered closed-end investment companies to make repurchase offers on a monthly basis.

APPLICANTS: Nuveen Enhanced Floating Rate Income Fund, Nuveen Fund Advisors, LLC, Nuveen Asset Management, LLC, and Nuveen Securities, LLC.

FILING DATE: The application was filed on December 6, 2023.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on January 16, 2024, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Mark L. Winget, *mark.winget@nuveen.com,* with a copy to Joel D. Corriero, Esq., Stradley Ronon Stevens & Young, LLP, *jcorriero@stradley.com.*

FOR FURTHER INFORMATION CONTACT: Trace W. Rakestraw, Senior Special Counsel, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' application, dated December 6, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Dated: December 22, 2023.

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28672 Filed 12–27–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99227; File No. SR–CboeEDGX–2023–081]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Fees Schedule Related to Physical Port Fees

December 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 20, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

[31] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's options platform (EDGX Options), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGX–2023–044). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–057. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeEDGX–2023–62). On October 13, 2023, the Exchange withdrew that filing and on business date October 16, 2023 submitted SR–CboeEDGX–2023–065. On December 12, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–079. On December 20, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port; *see also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83450 (June 15, 2018), 83 FR 28884 (June 21, 2018) (SR–CboeEDGX–2018–016).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See, e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port; *see also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 124 members that trade equities, Cboe BZX has 132 members that trade equities, Cboe EDGA has 103 members and Cboe BYX has 110 members. There is also no firm that is a Member of EDGX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[18] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gbps port (*i.e.,* use one single 10 Gbps port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentive the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options).This is similar to cell phone carriers offering a new iPhone at a discount (or event at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (*nasdaqtrader.com*); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

agency broker-dealers that have numerous customers of their own. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitive rates, members and non-members (such as third-party resellers) alike may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange, which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [22] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [23] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [24] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[25] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as

[21] *See, e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port; *see also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[22] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(8).

[25] *See also* 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 12 non-Cboe affiliated equities markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [26] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[27] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

[26] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[27] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [28] and paragraph (f) of Rule 19b–4 [29] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGX–2023–081 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR-CboeEDGX–2023–081. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–081 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28613 Filed 12–27–23; 8:45 am]

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[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99219; File No. SR–CboeBZX–2023–103]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Fees Schedule Related to Physical Port Fees

December 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 12, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's options platform (BZX Options), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBZX–2023–046). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeBZX–2023–067. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On October 2, 2023, the Exchange filed the proposed fee change (SR–CboeBZX–2023–080). On October 13, 2023, the Exchange withdrew that filing and on business date October 16, 2023 submitted SR–CboeBZX–2023–084. On December 12, 2023, the Exchange withdrew that filing and submitted this filing.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83442 (June 14, 2018), 83 FR 28675 (June 20, 2018) (SR–CboeBZX–2018–037).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 132 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe EDGA has 103 members and Cboe BYX has 110 members. There is also no firm that is a Member of BZX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[18] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services. That is, even firms that wish to utilize a single, dedicated 10 Gb port (*i.e.,* use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). This is

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (nasdaqtrader.com); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

similar to cell phone carriers offering a new iPhone at a discount (or even at no cost) if purchased in connection with a new monthly phone plan. These services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive. Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Moreover, if the Exchange were to assess supracompetitve rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity. Disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [22] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [23] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [24] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[25] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members

[21] *See e.g., See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[22] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[23] 15 U.S.C. 78f(b)(5).

[24] 15 U.S.C. 78f(8).

[25] *See* also 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so. Indeed, market participants have numerous alternative venues that they may participate on and direct their order flow, including 12 non-Cboe affiliated equities markets, as well as off-exchange venues, where competitive products are available for trading. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [26] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission*, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[27] Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [28] and paragraph (f) of Rule 19b–4 [29] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–103 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2023–103. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–103 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28605 Filed 12–27–23; 8:45 am]

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[26] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[27] *NetCoalition* v. *SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99222; File No. SR–CBOE–2023–018]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Make Permanent the Operation of its Flexible Exchange Options Pilot Program Regarding Permissible Exercise Settlement Values for FLEX Index Options

December 21, 2023.

I. Introduction

On April 10, 2023, Cboe Exchange, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

make permanent the operation of its Flexible Exchange Options (''FLEX Options'') pilot program that permits PM-settled Flexible Exchange Index Options (''FLEX PM Third Friday Options'') to expire on or within two business days of the third-Friday-of-the-month expirations for non-FLEX Options (''Pilot Program'').[3] The proposed rule change was published for comment in the **Federal Register** on April 28, 2023.[4]

On June 8, 2023, pursuant to section 19(b)(2) of the Act,[5] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[6] On July 19, 2023, the Commission instituted proceedings under section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the proposed rule change.[8] On September 26, 2023, CBOE filed Amendment No. 1 to the proposed rule change.[9] On September 27, 2023, the Commission designated a longer period for Commission action on the proposed rule change.[10] On November 20, 2023, CBOE filed Amendment No. 2 to the proposed rule change.[11] On December 7, 2023, CBOE filed Amendment No. 3 to the proposed rule change.[12] The Commission is publishing this notice to solicit comments on Amendment No. 3 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

II. Self-Regulatory Organization's Description of the Proposal, as Modified by Amendment No. 3[13]

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make permanent its Pilot Program that permits the Exchange to list FLEX Options overlying indexes (''FLEX Index Options'') whose exercise settlement value is derived from closing prices on the last trading day prior to expiration that expire on or within two business days of a third Friday-of-the-month expiration day for a non-FLEX Option (other than QIX options) (''FLEX PM Third Friday Options''). The Securities and Exchange Commission (the ''Commission'') approved a Cboe Options rule change that, among other things, established a pilot program regarding permissible exercise settlement values for FLEX Index Options on January 28, 2010.[14] The Exchange has extended the pilot period nearly 20 times since the Commission initially approved the Pilot Program in 2010, with the pilot period currently set to expire on the earlier of May 6, 2024 or the date on which the pilot program is approved on a permanent basis.[15] The Exchange hereby requests that the Commission approve the Pilot Program on a permanent basis.

By way of background, when cash-settled[16] index options were first introduced in the 1980s, settlement was based on the closing value of the underlying index on the option's expiration date. The Commission later became concerned about the impact of P.M.-settled, cash-settled index options on the markets for the underlying stocks at the close on expiration Fridays. Specifically, certain episodes of price reversals around the close on quarterly expiration dates attracted the attention of regulators to the possibility that the simultaneous expiration of index futures, futures options, and options might be inducing abnormal volatility in the index value around the close.[17] Academic research at the time provided

[3] A third-Friday-of-the month expiration is referred to as ''Expiration Friday''. Prior to the Pilot Program, Exchange rules prohibited PM-settled FLEX Index Options to expire on any business day that falls on or within two business days of an Expiration Friday. During the Pilot Program, PM-settled FLEX Index Options are permitted on or within two business days of an Expiration Friday.

[4] *See* Securities Exchange Act Release No. 97368 (April 24, 2023), 88 FR 26353 (''Notice'').

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 97672, 88 FR 38930 (June 14, 2023).

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See* Securities Exchange Act Release No. 97950, 88 FR 47930 (July 25, 2023).

[9] Amendment No. 1 superseded and replaced the original proposal in its entirety. Amendment No. 1 was subsequently superseded and replaced in its entirety by Amendment No. 2.

[10] *See* Securities Exchange Act Release No. 98557, 88 FR 68236 (October 3, 2023). The Commission designated December 24, 2023, as the date by which the Commission shall approve or disapprove the proposed rule change.

[11] Amendment No. 2 superseded and replaced Amendment No. 1 in its entirety. Amendment No. 2 was subsequently superseded and replaced in its entirety by Amendment No. 3.

[12] Amendment No. 3, which supersedes and replaces Amendment No. 2 in its entirety, provides additional support and data for the Exchange's assertion that listing and trading of FLEX PM Third Friday Index Options under the Pilot Program has had no negative impact on the market and price volatility of underlying indexes and their underlying component stocks or related products or negatively impacts options market quality. Amendment No. 3 is available at *https://www.sec.gov/comments/sr-cboe-2023-018/srcboe2023018-308519-794402.pdf.*

[13] This Section II reproduces Amendment No. 3, as filed by the Exchange.

[14] Securities Exchange Act Release No. 61439 (January 28, 2010), 75 FR 5831 (February 4, 2010) (SR–CBOE–2009–087) (''Approval Order''). The initial pilot period was set to expire on March 28, 2011, which date was added to the rules in 2010. *See* Securities Exchange Act Release No. 61676 (March 9, 2010), 75 FR 13191 (March 18, 2010) (SR–CBOE–2010–026).

[15] *See* Securities Exchange Act Release Nos. 64110 (March 23, 2011), 76 FR 17463 (March 29, 2011) (SR–CBOE–2011–024); 66701 (March 30, 2012), 77 FR 20673 (April 5, 2012) (SR–CBOE–2012–027); 68145 (November 2, 2012), 77 FR 67044 (November 8, 2012) (SR–CBOE–2012–102); 70752 (October 24, 2013), 78 FR 65023 (October 30, 2013) (SR–CBOE–2013–099); 73460 (October 29, 2014), 79 FR 65464 (November 4, 2014) (SR–CBOE–2014–080); 77742 (April 29, 2016), 81 FR 26857 (May 4, 2016) (SR–CBOE–2016–032); 80443 (April 12, 2017), 82 FR 18331 (April 18, 2017) (SR–CBOE–2017–032); 83175 (May 4, 2018), 83 FR 21808 (May 10, 2018) (SR–CBOE–2018–037); 84537 (November 5, 2018), 83 FR 56113 (November 9, 2018) (SR–CBOE–2018–071); 85707 (April 23, 2019), 84 FR 18100 (April 29, 2019) (SR–CBOE–2019–021); 87515 (November 13, 2020), 84 FR 63945 (November 19, 2019) (SR–CBOE–2019–108); 88782 (April 30, 2020), 85 FR 27004 (May 6, 2020) (SR–CBOE–2020–039); 90279 (October 28, 2020), 85 FR 69667 (November 3, 2020) (SR–CBOE–2020–103); 91782 (May 5, 2021), 86 FR 25915 (May 11, 2021) (SR–CBOE–2021–031); 93500 (November 1, 2021), 86 FR 61340 (November 5, 2021) (SR–CBOE–2021–064); 94812 (April 28, 2022), 87 FR 26381 (May 4, 2022) (SR–CBOE–2022–020); 96239 (November 4, 2022), 87 FR 67985 (November 10, 2022) (SR–CBOE–2022–053); 97452 (May 8, 2023), 88 FR 30821 (May 12, 2023) (SR–CBOE–2023–025); and 98637 (September 28, 2023), 88 FR 68819 (October 4, 2023) (SR–CBOE–2023–057). At the same time the permissible exercise settlement values pilot was established for FLEX Index Options, the Exchange also established a pilot program eliminating the minimum value size requirements for all FLEX Options. *See* Approval Order, *supra* note 3. The pilot program eliminating the minimum value size requirements was extended twice pursuant to the same rule filings that extended the permissible exercise settlement values (for the same extended periods) and was approved on a permanent basis in a separate rule change filing. *See id.; and* Securities Exchange Act Release No. 67624 (August 8, 2012), 77 FR 48580 (August 14, 2012) (SR–CBOE–2012–040) (Order Granting Approval of Proposed Rule Change Related to Permanent Approval of Its Pilot on FLEX Minimum Value Sizes).

[16] The seller of a ''cash-settled'' index option pays out the cash value of the applicable index on expiration or exercise. A ''physically settled'' option, like equity and ETF options, involves the transfer of the underlying asset rather than cash. *See* Characteristics and Risks of Standardized Options, available at: *https://www.theocc.com/Company-Information/Documents-and-Archives/Options-Disclosure-Document.*

[17] The close of trading on the quarterly expiration Friday (*i.e.,* the third Friday of March, June, September and December), when options, index futures, and options on index futures all expire simultaneously, became known as the ''triple witching hour.''

at least some evidence suggesting that futures and options expirations contributed to excess volatility and reversals around the close on those days.[18] In light of the concerns with P.M.-settlement and to help ameliorate the price effects associated with expirations of P.M.-settled, cash-settled index products, in 1987, the Commodity Futures Trading Commission (''CFTC'') approved a rule change by the Chicago Mercantile Exchange (''CME'') to provide for A.M. settlement [19] for index futures, including futures on the S&P 500 Index.[20] The Commission subsequently approved a rule change by Cboe Options to list and trade A.M.-settled SPX options.[21] In 1992, the Commission approved Cboe Options' proposal to transition all of its European-style cash-settled options on the S&P 500 Index to A.M.-settlement [22]; however, in 1993, the Commission approved a rule allowing Cboe Options to list P.M.-settled options on certain broad-based indices, including the S&P 500 Index, expiring at the end of each calendar quarter (''Quarterly Index Expirations'').[23] Starting in 2006, the Commission noticed or approved numerous rule changes, on a pilot basis, permitting the Cboe Options to introduce other index options with P.M.-settlement.[24] These include the Pilot Program,[25] P.M.-settled index options expiring weekly (other than the third Friday of the month) and at the end of each month (''EOM''),[26] P.M.-settled options on the S&P 500 Index that expire on the third Friday-of-the-month (''SPXPM''),[27] as well as P.M.-settled Mini-SPX Index (''XSP'') options and Mini-Russell 2000 Index (''MRUT'') options expiring on the third Friday of the month.[28] The Commission recently approved proposed rule changes to make these other pilot programs to list P.M.-settled index options permanent.[29]

FLEX Index Options have traded on the Exchange since February 1993.[30] The Exchange began offering FLEX Index options in response to the development of an over-the-counter (''OTC'') market in customized index options, in which participants could designate basic option features, including size, expiration date, exercise style, and certain exercise prices.[31] FLEX Index Options provide investors with the ability to customize these basic options terms in order to meet their individual investment needs. The Exchange understands that participants in the FLEX market are typically sophisticated portfolio managers, insurance companies, and other institutional investors who buy and sell options in larger-sized transactions. The Exchange continues to believe that market participants benefit from the trading of FLEX Index Options in several ways, including, but not limited to the following: (1) enhanced efficiency in initiating and closing out positions; (2) increased market transparency; and (3) heightened contra-party creditworthiness due to the role of the Options Clearing Corporation (''OCC'') as issuer and guarantor of FLEX Index Options. Further, the Exchange believes providing investors—institutional investors in particular—that require increased flexibility with respect to the terms of index options with the ability to customize basic options terms, including whether an option is A.M.-settled or P.M.-settled, is essential to meeting the needs of these investors so they can satisfy particular investment objectives that cannot otherwise be met by standard listed options.

In recent years, the Exchange has heard from numerous institutional investors—insurance companies, in particular—who use index options to hedge their portfolio risk need those options to provide them with a level of precision not available in standard options. They have expressed their preference to transact on the Exchange to eliminate the counterparty risk they must incur by trading in the OTC market. The Exchange understands that it is a critical and regular part of an insurance company's business to hedge their risk, which many do with index options. When insurance companies issue policies to their customers, those companies accumulate liabilities for the payouts they may need to make to their customers pursuant to those policies. Insurance companies regularly hedge the notional amount of these liabilities to protect against downturns in the market. Because they are looking to protect against broad market downturns, broad-based index options are a tool insurance companies often use for this protection. Given the size of insurance companies' portfolios, which can be in the tens of billions of dollars, these portfolios translate to index options with an aggregate notional value of billions of dollars being transacted annually. The Exchange understands these companies often have to trade in the nontransparent, unregulated, and riskier OTC market (where there is counterparty risk and no price protection exists for these customers) because standard listed options do not often provide them with the precision they need to execute their hedges.

[18] *See* Securities and Exchange Commission, Division of Economic Risk and Analysis, Memorandum, Cornerstone Analysis of PM Cash-Settled Index Option Pilots (February 2, 2021) (''DERA Staff PM Pilot Memo'' or ''Pilot Memo'') at 5, available at: *https://www.sec.gov/files/Analysis_of_PM_Cash_Settled_Index_Option_Pilots.pdf*.

[19] The exercise settlement value for an A.M.-settled index option is determined by reference to the reported level of the index as derived from the opening prices of the component securities on the business day before expiration.

[20] *See* Securities Exchange Act Release No. 24367 (April 17, 1987), 52 FR 13890 (April 27, 1987) (SR–CBOE–87–11) (noting that CME moved S&P 500 futures contract's settlement value to opening prices on the delivery date).

[21] *See id.*

[22] *See* Securities Exchange Act Release No. 30944 (July 21, 1992), 57 FR 33376 (July 28, 1992) (SR–CBOE–92–09). Thereafter, the Commission approved proposals by the options markets to transfer most of their cash-settled index products to A.M. settlement.

[23] *See* Securities Exchange Act Release No. 31800 (February 1, 1993), 58 FR 7274 (February 5, 1993) (SR–CBOE–92–13).

[24] Securities Exchange Act Release Nos. 54123 (July 11, 2006), 71 FR 40558 (July 17, 2006) (SR–CBOE–2006–65) (notice of filing of proposed rule change to list quarterly option series on up to five indexes or exchange-traded funds with p.m.-settlement); *see also* Securities Exchange Act Release No. 60164 (June 23, 2009), 74 FR 31333 (June 30, 2009) (SR–CBOE–2009–029) (order permanently approving the program to list quarterly option series on up to five indexes or exchange-traded funds with p.m.-settlement).

[25] *See* Approval Order, *supra* note 14.

[26] *See* Securities Exchange Act Release Nos. 62911 (September 14, 2010), 75 FR 57539 (September 21, 2010) (SR–CBOE–2009–075); 76529 (November 30, 2015), 80 FR 75695 (December 3, 2015) (SR–CBOE–2015–106); 78132 (June 22, 2016), 81 FR 42018 (June 28, 2016) (SR–CBOE–2016–046); *and* 78531 (August 10, 2016), 81 FR 54643 (August 16, 2016) (SR–CBOE–2016–046).

[27] *See* Securities Exchange Act Release No. 68888 (February 8, 2013), 78 FR 10668 (February 14, 2013) (SR–CBOE–2012–120) (the ''SPXPM Approval Order''). Pursuant to Securities Exchange Act Release No. 80060 (February 17, 2017), 82 FR 11673 (February 24, 2017) (SR–CBOE–2016–091), the Exchange moved third-Friday P.M.-settled options into the S&P 500 Index options class, and as a result, the trading symbol for P.M.-settled S&P 500 Index options that have standard third Friday-of-the-month expirations changed from ''SPXPM'' to ''SPXW.'' This change went into effect on May 1, 2017, pursuant to Cboe Options Regulatory Circular RG17–054.

[28] *See* Securities Exchange Act Release Nos. 70087 (July 31, 2013), 78 FR 47809 (August 6, 2013) (SR–CBOE–2013–055); *and* 91067 (February 5, 2021) 86 FR 9108 (February 11, 2021) (SR–CBOE–2020–116).

[29] *See* Securities Exchange Act Release Nos. 98454 (September 20, 2023) (SR–CBOE–2023–005) (order approving proposed rule change to make permanent the operation of a program that allows the Exchange to list p.m.-settled third Friday-of-the-month SPX options series) (''SPXPM Approval''); 98455 (September 20, 2023) (SR–CBOE–2023–019) (order approving proposed rule change to make permanent the operation of a program that allows the Exchange to list p.m.-settled third Friday-of-the-month XSP and MRUT options series) (''XSP and MRUT Approval''); and 98456 (September 20, 2023) (SR–CBOE–2023–020) (order approving proposed rule change to make the nonstandard expirations pilot program permanent) (''Nonstandard Approval'').

[30] *See* Securities Exchange Act Release No. 31920 (February 24, 1993), 58 FR 12280 (March 3, 1993) (SR–CBOE–92–17).

[31] *See id.* at 12281.

Whether an insurance company is able to precisely hedge the notional value of its portfolio ultimately impacts its customers. If an insurance company, for example, ''underhedges'' the notional value of its portfolio (which, again, is generally at least tens of billions of dollars), even 1% of such ''slippage'' would leave hundreds of millions of dollars of that portfolio unhedged,[32] which creates significant risk for that company.[33] Alternatively, if an insurance company ''overhedges'' the notional value of its portfolio, that would unnecessarily tie up some of its financial resources, as the difference in value of the options and the value of the portfolio is serving no purpose. Either case will likely result in higher premiums or reduced benefits for customers. Therefore, the Exchange believes providing insurance companies with the continued ability to hedge with p.m.-settled index options on all days, including the third Friday-of-the-month, is critical so that insurance companies, in addition to other institutional investors, can choose FLEX Index Options terms that provide them with the precision they need to implement their hedging strategies on the Exchange as opposed to the unregulated, riskier OTC market.

The benefits of the Exchange's FLEX market are demonstrated by the continued increase volume of FLEX Options executed on the Exchange. In 2012, just under 9 million FLEX Options contracts (nearly 1.7 million of which were FLEX Index Options contracts) executed on the Exchange, compared to approximately 38.9 million FLEX Options contracts (over 2.8 million of which were FLEX Index Options contracts) that executed on the Exchange in 2023 (through August). The Exchange has attributed much of the growth in the FLEX Options markets in recent years to the entrance into the FLEX market of new institutional investors. Institutional investors often use FLEX Options to execute their volatility strategies using exercise values and expiration dates not available in the standard market. Additionally, issuers of exchange-traded funds (''ETFs'') have recently increased their usage of FLEX Options. FLEX Options are particularly useful in ETFs as opposed to standardized options contracts because they enable the issuers to have more granular control over the options exposure within a portfolio. In particular, ETFs that are designed to provide a ''defined outcome'' (*i.e.,* a defined upside and downside risk to a particular index or underlying ETF) use FLEX Options because they can be used to tailor the options exposure in the portfolio by strike and date in such a way that is not possible with standardized options contracts.

As stated above, since its inception in 2010, the Exchange has continuously extended the Pilot Program period and, during the course of the Pilot Program and in support of the extensions of the Pilot Program, the Exchange has submitted reports to the Commission regarding the Pilot Program that detail the Exchange's experience with the Pilot Program, pursuant to the Pilot Program requirements.[34] Specifically, the Exchange provided the Commission with annual reports analyzing volume and open interest for each broad-based FLEX Index Options class overlying a third Friday-of-the-month expiration day, P.M.-settled FLEX Index Options series. The annual reports also contained certain pilot period and pre-pilot period analyses of volume and open interest for third Friday-of-the-month expiration days, A.M.-settled FLEX Index series and third Friday-of-the-month expiration day Non-FLEX Index series overlying the same index as a third Friday-of-the-month expiration day, P.M.-settled FLEX Index option. The annual reports also contained information and analysis of FLEX Index Options trading patterns, and index price volatility and underlying share trading activity for each broad-based index class overlying an Expiration Friday, P.M.-settled FLEX Index Option that exceeds certain minimum open interest parameters. The Exchange also provided the Commission, on a periodic basis, interim reports of volume and open interest.

Also, during the course of the Pilot Program, the Exchange provided the Commission with any additional data or analyses the Commission requested if it deemed such data or analyses necessary to determine whether the Pilot Program was consistent with the Exchange Act. The Exchange has made public on its website all data and analyses previously submitted to the Commission under the Pilot Program,[35] and will continue to make public any data and analyses it submits to the Commission while the Pilot Program is still in effect.

The Exchange has concluded that FLEX PM Third Friday Options have not resulted in increased market and price volatility in the underlying component stocks, negatively impacted market quality, or raised any unique or prohibitive regulatory concerns. The Exchange has identified no evidence from the pilot data indicating that the trading of FLEX PM Third Friday Options had any adverse impact on fair and orderly markets on Expiration Fridays for broad-based indexes or the underlying securities comprising those indexes and has observed no abnormal market movements attributable to FLEX PM Third Friday Options from any market participants that have come to the attention of the Exchange.[36]

Based on a study conducted by the Commission's Division of Economic and Risk Analysis (''DERA'') staff on the pilot data from 2006 through 2018,[37] and the Exchange's review of the pilot data from 2019 through 2021, the size of the market for P.M.-settled SPX options (including quarterly, weekly, EOM and third Friday expirations) since 2007 has grown from a trivial portion of the overall market to a substantial share (from around 0.1% of open interest in 2007 to 30% in 2021).[38] Notional value of open interest in P.M.-settled SPX options increased from approximately a median of $1.5 billion in 2007 to $1.9 trillion in 2021, approximately 1260 times its value in 2007. Notional open interest in A.M.-settled SPX options was already hovering around a median of $1.4 trillion in 2007, and it has since increased to approximately $4.4 trillion in 2021. It is also important to note that open interest on expiring P.M.-settled SPX options, as compared to A.M.-

[32] For example, if an insurance company has a $40,000,000,000 portfolio, 1% of that portfolio equates to $400,000,000.

[33] The Exchange notes the total unhedged risk across the insurance industry would be multiplied if each insurance company were unable to hedge the full notional value of its portfolio.

[34] *See* Approval Order, *supra* note 14.

[35] Available at *https://www.cboe.com/aboutcboe/legal-regulatory/national-market-system-plans/pm-settlement-spxpm-data.*

[36] The Exchange also notes it is unaware of any concerns raised to it by market participants or of any public comments expressing concerns about the Pilot Program, including with respect to the current rule filing (which was noticed for public comment on April 28, 2023 and for which no public comments were submitted).

[37] *See* DERA Staff PM Pilot Memo, at 13 (''Option settlement quantity data for A.M.- and P.M.-settled options were obtained from the Cboe, including the number of contracts that settled in-the-money for each exchange-traded option series on the S&P 500 index . . . on expiration days from January 20, 2006 through December 31, 2018. Daily open interest and volume data for [SPX] option series were also obtained from Cboe, including open interest data from January 3, 2006 through December 31, 2018 and trading volume data from January 3, 2006 through December 31, 2018.'')

[38] The DERA staff study reviewed and provided statistics for market share, median notional value of open interest and median volume in 2007 and in 2018. The Exchange provides updated statistics for market share, median notional value of open interest and median volume in 2021, replacing the 2018 statistics provided in the Commission staff study.

settled options, is spread out across a greater number of expiration dates, which results in a smaller percentage of open interest expiring on any one date, thus mitigating concerns that SPXPM option expiration may have a disruptive effect on the market.[39] Daily trading volume in P.M.-settled SPX options has increased from a median of about 700 contracts in 2007 to nearly 1.9 million contracts in 2021,[40] and now exceeds trading volume in A.M.-settled SPX options.

Moreover, the DERA staff study of the P.M.-settled SPX options pilot data (2006 through 2018) did not identify any significant economic impact on S&P 500 futures,[41] the S&P 500 Index, or the underlying component securities of the S&P 500 Index surrounding the close. For purposes of the study, volatility was by and large measured by using the standard deviation [42] of one-minute returns of S&P 500 futures values and the index value during regular hours on each day reviewed (excluding the first and last 15 minutes of trading) and then compared with the standard deviation of one-minute returns (for S&P 500 futures, the S&P 500 Index, and the underlying component securities of the S&P 500 Index) over the last 15 minutes of a trading day.[43] Using this as a general measure,[44] the DERA staff study then reviewed whether, and to what extent, the settlement quantity of SPXPM options and the levels of open interest in SPXPM options on expiration days (as compared to non-expiration days) may be associated with general price volatility and price reversals for S&P 500 futures, the S&P 500 Index, and the underlying component securities of the S&P 500 Index near the close. From its review of the study, the Exchange agrees that, although volatility before the market close is generally higher than during the rest of the trading day, there is no evidence of any significant adverse economic impact to the futures, index, or underlying index component securities markets as a result of the quantity of P.M.-settled SPX options that settle at the close or the amount of expiring open interest in P.M.-settled SPX options. For example, the largest settlement event that occurred during the time period of the study (a settlement of $100.4 billion of notional on December 29, 2017) had an estimated impact on the futures price of only approximately 0.02% (a predicted impact of $0.54 relative to a closing futures price of $2,677).

In particular, the DERA staff study found that an additional P.M.-settled SPX options settlement quantity equal to $10 billion in notional value is associated with a marginal impact on futures prices during the last 15 minutes of the trading day of only about $0.06 (where the hypothetical index level is 2,500), additional expiring open interest in P.M.-settled SPX options equal to $10 billion in notional value is associated with a marginal impact on futures prices during the last 15 minutes of the trading day of only about $0.05 (assumed index level is 2,500). Also, an additional increase in settlement quantity or in expiring open interest, each equal to $20 million in notional value, did not result in any meaningful futures price reversals near the close (neither was found to cause a price reversal of over one standard deviation.[45])

Likewise, the study identified that an additional total P.M.-settled SPX options settlement quantity equal to $10 billion in notional value corresponds to price movement in the S&P 500 of only about $0.08 (assuming an index level of 2,500) during the last 15 minutes of the trading day, and that additional expiring open interest equal to $10 billion in notional value corresponds to a price movement in the S&P 500 of only about $0.06 (assuming an index level of 2,500) during the last 15 minutes of the trading day. The study also identified that it would take an increase of $34 billion in notional value of total settlement quantity and of expiring open interest for one additional S&P 500 price reversal of greater than two standard deviations to occur in the last 15 minutes before the market close. Also, regarding potential impact to S&P 500 component securities, it would take an increase in total P.M.-settled SPX options settlement quantity equal to $20 billion to effect a price movement of only approximately $0.03 for a $200 stock, an increase in expiring open interest in P.M.-settled SPX options equal to $10 billion to effect a price movement less than half a standard deviation, and an increase in total P.M.-settled SPX settlement quantity equal to $7 billion to achieve a price reversal greater two standard deviations.

The study employed the same metrics to determine whether there is greater price volatility for S&P 500 futures, the S&P 500, and the component securities of the S&P 500 related to SPXPM option settlements during an environment of high market volatility (*i.e.,* on days in which the VIX Index was in the top 10% of closing index values) and did not identify indicators of any significant economic impact on these markets near the close as a result of the P.M.-settled SPX options settlement.[46] In addition to this, the DERA staff study, applying the same metrics and analysis as for P.M.-settled SPX options to A.M.-settled SPX options, did not identify any evidence of a statistically significant relationship between settlement quantity or expiring open interest of A.M.-settled options and volatility near the open.

Upon review of the results of the DERA staff study, the Exchange agrees that each of the above-described marginal price movements in S&P 500 futures, the S&P 500, and the S&P 500 component securities affected by increases in P.M.-settled SPX options settlement quantity and expiring open interest appear to be de minimis pricing changes from those that occur over regular trading hours (outside of the last 15 minutes of the trading day). Further, the Exchange has not observed any significant economic impact or other adverse effects on the market from similar reviews of its pilot reports and data submitted after 2018.[47] In its review of a sample of the pilot data from 2019 through 2021, the Exchange similarly measured volatility over the final fifteen minutes of each trading day by taking the standard deviation of

[39] *See* DERA Staff PM Pilot Memo, at 2.

[40] The Exchange notes that the DERA staff study used two-sided volume data for the median volume in 2007 and in 2018; therefore, the Exchange provides two-sided volume data for the median volume in 2021.

[41] Futures on the S&P 500 experience high volume and liquidity both before and after the close of the underlying market. Therefore, futures are a useful measure of abnormal volatility surrounding the close and the open. *See* DERA Staff PM Pilot Memo, at 14. The Exchange agrees with this approach.

[42] Standard deviation applied to a rate of return (in this case, one-minute) of an instrument can indicate that instrument's historical volatility. The greater the standard deviation, the greater the variance between price and the mean, which indicates a larger price range, *i.e.,* higher volatility.

[43] For example, if on a particular day the standard deviation of one-minute returns between 3:45 p.m. ET and 4:00 p.m. ET is 0.004 and the standard deviation of returns from 9:45 a.m. ET to 3:45 p.m. ET is 0.002, this metric would take on a value of 2 for that day, indicating that volatility during the last 15 minutes of the trading day was twice as high as it was during the rest of the trading day. *See* DERA Staff PM Pilot Memo, at 15; *see also* DERA Staff PM Pilot Memo, at Section V, which discusses in detail the metrics used to measure, for the purposes of the study, the extent to which the market may experience abnormal volatility surrounding SPXPM option settlement.

[44] *See* DERA Staff PM Pilot Memo, at Section V, which discusses in detail the metrics used to measure, for the purposes of the study, the extent to which the market may experience abnormal volatility surrounding SPXPM option settlement.

[45] *See supra* note 42.

[46] The Exchange also notes that the study did not identify any evidence that less liquid S&P 500 constituent securities experienced any greater impact from the settlement of P.M.-settled SPX options.

[47] Total SPX open interest volumes were examined for expiration dates over a roughly two-year period between October 2019 and November 2021.

rolling one-minute returns of the S&P 500 level (excluding the first and last fifteen minutes of trading) and comparing such with the standard deviation of one-minute returns [48] of the S&P 500 level, over the last 15 minutes of a trading day. The Exchange identified an average standard deviation ratio of 1.42 for the S&P 500 on non-expiration days and an average standard deviation ratio of 1.54 for the S&P 500 on expiration days (a ratio between expiration days and non-expiration days of 1.09). The Exchange also notes that, using the same methodology, it observed that, from 2015 through 2019,[49] the average standard deviation ratio for the S&P 500 on non-expiration days was 1.11 and the average standard deviation ratio for the S&P 500 on expiration days was 1.22 (a ratio between expiration days and non-expiration days of 1.10). While the average standard deviation ratio on both expiration and non-expiration days was higher in 2019 through 2021 due to overall market volatility, the ratios between the standard deviation ratios on expiration days and non-expirations days remained nearly identical between the 2015 through 2019 timeframe and the 2019 through 2021. The Exchange believes this shows that, in cases where overall market volatility may increase, the normalized impact on expiration days to non-expiration days generally remains consistent.

In addition to this, the Exchange notes that the S&P 500 Index is rebalanced quarterly. The changes resulting from each rebalancing coincide with the third Friday of the quarterly rebalancing month (*i.e.,* March, June, September, October and December) [50] and generally drive an increase in trading activity from investors that seek to track the S&P 500. As such, the Exchange measured volatility on quarterly rebalancing dates and found that the average standard deviation ratio was 1.62, which suggests more closing volatility on quarterly rebalance dates compared to non-quarterly expiration dates (for which the average standard deviation ratio was 1.22), thus indicating that the impact rebalancing may have on the S&P 500 Index is greater than any impact that P.M.-settled SPX options may have on the S&P 500 Index.

The Exchange additionally focused its study of the post-2018 sample pilot data on reviewing for potential correlation between excess market volatility and price reversals and the hedging activity of liquidity providers. As explained in the DERA staff study, potential impact of P.M.-settled SPX options on the correlated equity markets is thought to stem from the hedging activity of liquidity providers in such options.[51] To determine any such potential correlation, the Exchange studied the expected action of liquidity providers that are the primary source of the hedging on settlement days. These liquidity providers generally delta-hedge their S&P 500 Index exposure via S&P 500 futures and on settlement day unwind their futures positions that correspond with the delta of their in-the-money (ITM) expiring P.M.-settled SPX options. Assuming such behavior, the Exchange estimated the Market-On-Close (''MOC'') [52] volume for the shares of the S&P 500 component securities (*i.e.,* ''MOC share volume'') that could ultimately result from the unwinding of the liquidity providers' futures positions by equating the notional value of the futures positions that correspond to expiring ITM open interest to the number S&P 500 component security contracts (based on the weight of each S&P 500 component security). That is, the Exchange calculated (an estimate) of the amount of MOC volume in the S&P 500 component markets attributable hedging activity as a result of expiring ITM P.M.-settled SPX options (*i.e.,* ''hedging MOC''). The Exchange then: (1) compared the hedging MOC share volume to all MOC share volume on expiration days and non-expiration trading days; and (2) compared the notional value of the hedging futures positions (*i.e.,* that correspond to expiring ITM P.M.-settled SPX options open interest) to the notional value of expiring ITM P.M.-settled SPX options open interest, the notional value of all expiring P.M.-settled SPX options open interest and the notional value of all P.M.-settled SPX options open interest.

The Exchange observed that, on average, there were approximately 25% more MOC shares executed on expiration days (332 expiration days) than non-expiration days (209 non-expiration days). While, at first glance, the volume of MOC shares executed on expiration days seems much greater than the volume executed on non-expiration days, the Exchange notes that much of this difference is attributable to just eight expiration days—the quarterly index rebalancing dates captured within the scope of the post-2018 sample pilot data. The average MOC share volume on the eight quarterly rebalancing dates was approximately 4.8 times the average MOC share volume on the non-quarterly rebalancing expiration dates; again, indicating that the impact rebalancing may have on the S&P 500 Index is greater than any impact that P.M.-settled SPX options may have on the S&P 500 Index. That is, the Exchange observed that the majority of closing volume on quarterly rebalance dates is driven by rebalancing of shares in in the S&P 500, and not by P.M.-settled SPX options expiration-related hedging activity. Notwithstanding the MOC share volume on quarterly rebalancing dates, the volume of MOC shares executed on expiration days (324 expiration days) was only approximately 13% more than that on non-expiration days, substantially less than the increase in volume over non-expiration days wherein the eight index rebalancing dates are included in expiration day volume. In addition to this, the Exchange observed that the hedging MOC share volume (*i.e.,* the expected MOC share volume resulting from hedging activity in connection with expiring ITM P.M.-settled SPX options) was, on average, less than the MOC share volume on non-expiration days, and was only approximately 20% of the total MOC share volume on expiration days, indicating that other sources of MOC share volume generally exceed the volume resulting from hedging activity of expiring ITM P.M.-settled SPX options and would more likely be a source of any potential market volatility.

The Exchange also observed that, across all third-Friday expirations, the notional value of the hedging futures positions was approximately 25% of the notional value of expiring ITM P.M.-settled SPX options, approximately 3.8% of the notional value of all expiring P.M.-settled SPX options, and approximately only 0.5% of the notional value of all P.M.-settled SPX options. As such, the estimated hedging activity from liquidity providers on expiration days is a fraction of the expiring open interest in P.M.-settled SPX options, which, the Exchange notes, is only 14% of the total open interest in P.M.-settled SPX options; thus, indicating negligible capacity for hedging activity to increase volatility in the underlying markets.

At the request of the Commission in connection with proposed rule changes to make other p.m.-settled options pilot programs permanent, the Exchange recently completed an analysis intended to evaluate whether the introduction of P.M.-settled options impacted the

[48] Calculated at every tick for the prior minute.

[49] November 2015 through November 2021.

[50] *See* S&P Dow Jones Indices, Equity Indices Policies & Practices, Methodology (August 2021), at 15, available at *https://www.spglobal.com/spdji/en/documents/methodologies/methodology-sp-equity-indices-policies-practices.pdf.*

[51] *See* DERA Staff PM Pilot Memo, at 10–12.

[52] MOC orders allow a market participant to trade at the closing price. Market participants generally utilize MOC orders to ensure they exit positions at the end of the trading day.

quality of the A.M.-settled option market. Specifically, the Exchange compared values of key market quality indicators (specifically, the bid-ask spread [53] and effective spread [54]) in SPXW options both before and after the introduction of Tuesday expirations and Thursday expirations for SPXW options on April 18 and May 11, 2022, respectively.[55] Options on the Standard & Poor's Depositary Receipts S&P 500 ETF (''SPY'') were used as a control group to account for any market factors that might influence key market quality indicators. The Exchange used data from January 3, 2022 through March 4, 2022 (the two-month period prior to the introduction of SPXW options with Tuesday expirations) and data from May 11, 2022 to July 10, 2022 (the two-month period following the introduction of SPXW options with Thursday expirations).[56]

As a result of this analysis, the Exchange believes the introduction of SPX options with Tuesday and Thursday options had no significant impact on the market quality of SPXW options with Monday, Wednesday, and Friday expirations. With respect to the majority of series analyzed, the Exchange observed no statistically significant difference in the bid-ask spread or the effective spread of the series in the period prior to introduction of the Tuesday and Thursday expirations and the period following the introduction of the Tuesday and Thursday expirations. While statistically insignificant, the Exchange notes that in many series, particularly as they were closer to expiration, the Exchange observed that the values of these spreads decreased during the period following the introduction of the Tuesday and Thursday expirations.[57] The full analysis is included in Exhibit 3 of this Amendment No. 3.[58]

Given the time that as passed since the introduction of FLEX PM Third Friday Options, the Exchange is unable to analyze whether the introduction of those options significantly impacted the market quality of non-FLEX A.M.-settled options at the time the FLEX PM Third Friday Options began trading. Additionally, the Exchange is unable to analyze whether the introduction of the FLEX P.M.-settled options significantly impacted the market quality of A.M.-settled FLEX options, as there is no book for FLEX options (and thus no quoted spreads), as FLEX options are listed only if and when market participants create them for trading. The Exchange acknowledges the above analysis, due to the type of study performed, may not be used as a direct substitute to demonstrate that the introduction of FLEX PM Third Friday Options did not significantly impact the market quality of non-FLEX A.M.-settled options. However, the Exchange believes the analysis is relevant. Since 2013, approximately 400,000 contracts in FLEX PM Third Friday Options have executed on the Exchange, compared to 156 million total FLEX Options contracts; 14.2 billion total options contracts; 5.6 billion index option contracts; 3.8 billion total SPX options contracts; and 2.3 billion A.M.-settled SPX options contracts in the same time period. This equates to an ADV of under 150 contracts for FLEX PM Third Friday Options compared to an ADV of over 800,000 contracts for SPX options over that time. As noted above, the Exchange's analysis demonstrated the introduction of SPXW options with Tuesday and Thursday expirations did not significantly impact the market quality of non-FLEX SPX P.M.-options. Given that the Exchange determined, based on its above analysis, that the introduction of SPXW options with Tuesday and Thursday expirations had no significant impact on the market quality of non-FLEX SPX A.M.-settled options, the Exchange believes it is logical and reasonable to conclude that it is unlikely that the introduction of FLEX PM Third Friday Options (which has an ADV of approximately 0.04% the size of the ADV of SPXW Tuesday and Thursday expirations) [59] would have any impact on the market quality of non-FLEX SPX A.M.-settled options.

The Exchange believes it is fair to assume FLEX PM Third Friday Options likely had no measurable impact on that market of non-FLEX SPX options with A.M.-settlement for several reasons: (1) as noted above, the volume in the FLEX PM Third Friday Options is a minute fraction (0.02%) of SPX options with A.M.-settlement; (2) FLEX Options are not quoted on a continuous basis, so Market-Makers do not need to estimate the risk associated with the potential trade as they do with options they are continuously quoting in the non-FLEX Options market; and (3) the FLEX market requires either verbal responses on the trading floor or auction responses electronically to represented orders, which provides Market-Makers with time to decide whether to trade, something which does not occur for the thousands of series they continuously quote in the non-FLEX Options market.

To further support the Exchange's view that FLEX PM Third Friday Options did not materially impact the market quality of corresponding non-FLEX options, the Exchange evaluated each FLEX PM Third Friday Options trade for more than 500 contracts [60] that occurred on the Exchange during the last two years [61] and analyzed the market quality (specifically, the average time-weighted quote spread and size 30 minutes prior to the trade and the average time-weighted quote spread and size 30 minutes after the trade) of series of non-FLEX a.m.-settled options overlying the same index with similar terms as the FLEX PM Third Friday Option that traded (time to expiration, type (call or put), and strike price) as set forth in the table below: [62]

[53] The Exchange calculated for each of SPXW options (with Monday, Wednesday, and Friday expirations) and SPY Weekly options (with Monday, Wednesday, and Friday expirations) the daily time-weighted bid-ask spread on the Exchange during its regular trading hours session, adjusted for the difference in size between SPXW options and SPY options (SPXW options are approximately ten times the value of SPY options).

[54] The Exchange calculated the volume-weighted average daily effective spread for simple trades for each of SPXW options (with Monday, Wednesday, and Friday expirations) and SPY Weekly options (with Monday, Wednesday, and Friday expirations) as twice the amount of the absolute value of the difference between an order execution price and the midpoint of the national best bid and offer at the time of execution, adjusted for the difference in size between SPXW options and SPY options.

[55] For purposes of comparison, the Exchange paired SPXW options and SPY options with the same moneyness and same days to expiration.

[56] The Exchange observed comparable market volatility levels during the pre-intervention and post-intervention time ranges.

[57] In any series in which the Exchange observed an increase in the market quality indicators, the Exchange notes any such increase was also statistically insignificant.

[58] Exhibit 3 begins at page 72 of 85 of Amendment No. 3 and is available at *https://www.sec.gov/comments/sr-cboe-2023-018/srcboe2023018-308519-794402.pdf.*

[59] The Exchange acknowledges that, while FLEX PM Third Friday Options has historically represented a very small percentage of overall volume, it is possible trading in these options may grow in the future.

[60] The Exchange believes it is reasonable to consider only these large trades, because if large trades had no significant impact on market quality, then the Exchange believe it is unlikely that smaller trades would have had a significant impact on market quality. As noted below, the vast majority of FLEX PM Third Friday Options executed as parts of trades smaller than 500 contracts (which would have a notional value of 225,000). *See* Amendment No. 3, at 29–30.

[61] The Exchange believes it is reasonable to use data from this time period as representative of the entire pilot period given that volume in FLEX PM Third Friday Options remained consistently low throughout the entire pilot period. The Exchange notes this sampling of data points may not cover different market conditions, such as volatility levels (*e.g.,* high volatility days), which may impact quote spreads and sizes of index options.

[62] All of these trades were SPX options. During the time period reviewed, there were no trades of more than 500 contracts for FLEX PM Third Friday Options in any other index class. The Exchange believes it is reasonable to limit this analysis to SPX options trades given that the vast majority of FLEX

Continued

Date	Time	Number of contracts	Average time-weighted quote price spread prior to trade ($)	Average time-weighted quote price spread after trade ($)	Average time-weighted quote size prior to trade (contracts)	Average time-weighted quote contract size after to trade (contracts)
10/25/22	11:57	660	9.89	9.08	16.4	16.7
3/21/23	13:07	660	9.40	9.76	13.8	13.9
12/20/22	12:23	655	10.29	10.28	27.2	27.5
11/22/22	12:49	635	9.85	9.78	25.6	25.8
9/20/22	12:50	615	10.16	10.23	15.4	15.0
4/25/23	13:05	610	11.66	11.54	20.1	19.9
5/23/23	12:24	610	9.65	9.77	18.6	18.7
5/24/22	11:44	590	8.99	8.87	15.1	15.6
3/22/22	12:36	575	10.44	10.39	19.2	19.1
6/27/23	11:58	560	9.57	9.61	13.9	14.3
7/25/23	14:12	550	10.87	10.85	22.1	22.8
8/23/23	13:48	535	11.41	11.44	15.6	15.2
1/24/23	12:16	535	9.54	9.43	21.6	22.0
2/21/23	13:01	515	10.20	10.22	18.61	18.65
6/21/22	12:47	510	11.12	11.08	14.2	14.8
7/26/22	12:23	510	10.66	10.67	16.8	16.8

As this table demonstrates, the average time-weighted quote spread and size did not materially change after the FLEX PM Third Friday Options trade. Specifically, the average time-weighted quoted spread was never more than 0.36 wider in the time period after the trade compared to before the trade, and the average time-weighted size was never more than 0.7 contracts different in the time period after the trade compared to before the trade. Further, given that the spreads were relatively stable before and after large trades, the Exchange believes this demonstrates that large FLEX PM Third Friday Options trades had no material negative impact (and the Exchange believes likely no impact) on quote quality of non-FLEX a.m.-settled options overlying the same index with similar terms as the FLEX PM Third Friday Option. The Exchange believes this evaluation effectively demonstrates it is likely that FLEX PM Third Friday Options have had no significant negative impact on the market quality of non-FLEX Options with A.M.-settlement.[63]

To further note, given the significant changes in the closing procedures of the primary markets in recent decades, including considerable advances in trading systems and technology, the Exchange believes that the risks of any potential impact of FLEX PM Third Friday Options on the underlying cash markets are also de minimis.

The Exchange proposes to make the Pilot Program permanent as P.M.-settled index products have become an integral part of the Exchange's product offerings, providing investors with greater trading opportunities and flexibility. As indicated by the significant growth in the size of the market for P.M.-settled options, as well as the significant growth in FLEX Options, such options have been, and continue to be, well-received and widely used by market participants. Therefore, the Exchange wishes to be able to continue to provide investors with the ability to trade FLEX PM Third Friday Options on a permanent basis. The Exchange believes that the permanent continuation of the Pilot Program will serve to maintain the status quo by continuing to offer a product to which investors have become accustomed and have incorporated into their business models and day-to-day trading methodologies for nearly 14 years. As such, the Exchange also believes that ceasing to offer FLEX PM Third Friday Options may result in market disruption and investor confusion. The Exchange has not identified any significant impact on market quality nor any unique or prohibitive regulatory concerns as a result of the Pilot Program, and, as such, the Exchange believes that the continuation of the Pilot Program as a pilot, including the use of time and resources to compile and analyze quarterly and annual pilot reports and pilot data, is no longer necessary and that making the Pilot Program permanent will allow the Exchange to otherwise allocate time and resources to other industry initiatives.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[64] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[65] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes that the making the Pilot Program permanent will allow the Exchange to be able to continue to offer FLEX PM Third Friday Options on a continuous and permanent basis. These products have been, and continue to be, well-received and widely used by market participants, providing investors with greater trading opportunities and flexibility. The Exchange believes that the permanent continuation of the Pilot Program will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest by continuing to offer a product to which investors have become accustomed and have incorporated into their business models and day-to-day trading strategies

PM Third Friday Options trade were in SPX options, and the limited number of trades in options FLEX PM Third Friday Options (particularly given the smaller size of such trades) would have created sampling difficulties for designing a meaningful analysis of the impact of such trades on market quality of the corresponding non-FLEX a.m.-settled options.

[63] The Exchange acknowledges that, while FLEX PM Third Friday Options has historically represented a very small percentage of overall volume, it is possible trading in these options may grow in the future.

[64] 15 U.S.C. 78f(b).

[65] 15 U.S.C. 78f(b)(5).

for nearly 14 years. The Exchange notes the Commission recently approved proposals to make other pilots permitting P.M.-settlement of index options permanent after finding those pilots were consistent with the Act and the options subject to those pilots had no significant impact on the market.[66] The Exchange believes ceasing to offer the Pilot Program may result in market disruption and investor confusion, as P.M.-settled index products, particularly SPX options, have become an integral part of the Exchange's product offerings, providing investors with greater trading opportunities and flexibility.

The Exchange further believes that making the Pilot Program permanent will remove impediments to and perfect the mechanism of a free and open market and a national market system and protect investors, while maintaining a fair and orderly market, as the Exchange believes that previous concerns (arising in the 1980s) regarding options expirations potentially contributing to excess volatility and reversals around the close have been adequately diminished. As described in detail above, the Exchange has observed no significant adverse market impact or identified any meaningful regulatory concerns during the nearly 14-year operation of the FLEX PM Third Friday Program as a pilot nor during the 15 years since P.M.-settled index options (SPX) were reintroduced to the marketplace.[67] Notably, the Exchange did not identify any significant economic impact (including on pricing or volatility or in connection with reversals) on related futures, the underlying indexes, or the underlying component securities of the underlying indexes surrounding the close as a result of the quantity of FLEX PM Third Friday Options or the amount of expiring open interest in FLEX PM Third Friday Options, nor any demonstrated capacity for options hedging activity to impact volatility in the underlying markets. While the DERA staff study and corresponding Exchange study described above specifically evaluated SPX options, FLEX PM Third Friday Options overlay broad-based indexes (including the S&P 500 Index), the Exchange believes it is appropriate to extrapolate the data to apply to FLEX PM Third Friday Options. This is particularly true given that the data and reports submitted by the Exchange during the pilot period have similarly demonstrated no significant economic impact on the respective underlying indexes or other products. As set forth in the data and reports the Exchange provided to the Commission during the pilot period and noted above, since 2013, approximately 400,000 contracts in FLEX PM Third Friday Options executed on the Exchange (the vast majority of which were SPX options). Given that this represented approximately 0.01% of all SPX options volume executed on the exchange during that time, the Exchange believes the chance that such a small number of contracts [68] could have measurably impacted the underlying index or other products is near zero. This is consistent with the findings in the DERA staff study set forth above regarding the impact of certain notional amounts of SPX options on the underlying index and related futures. For example, if you assume an index value for the S&P 500 Index of 4500, the notional value of one SPX option contract is 450,000. If 400,000 FLEX PM Third Friday Option contracts executed since 2013, that results in an average annual volume of approximately 36,300 FLEX PM Third Friday Options, with the notional value of this total annual volume (the vast majority of which executed as parts of trades smaller than 500 contracts (which would have a notional value of 225,000), as demonstrated by the table above) of just over $16 billion. As discussed above, the DERA staff study demonstrated that a similar amount of notional value of P.M.-settled SPX options had only a marginal impact on the underlying index and related futures.

The DERA staff study and corresponding Exchange study concluded that a significantly larger amount of non-FLEX p.m.-settled index options had no significant adverse market impact and caused no meaningful regulatory concerns. Therefore, the Exchange believes it is reasonable to conclude that the relatively small amount of FLEX Index Option volume subject to the current Pilot Program would similarly have no significant adverse market impact or cause no meaningful regulatory concerns. Additionally, these studies measured any impact on related futures, the underlying indexes, or the underlying component securities of the underlying indexes surrounding the close. Despite FLEX SPX options (which represent approximately half of the year-to-date 2023 volume of FLEX Index Options but only approximately 0.3% of total SPX volume) not being included in the DERA staff study and corresponding Exchange study, those studies concluded that during the time periods covered (which included the period of time in which the Pilot Program has been operating), there was no significant economic impact on the underlying index or related products. Therefore, the Exchange believes it is reasonable to conclude that any FLEX SPX Options that executed during the timeframes covered by the studies had no significant impact on the underlying index or related products, as neither DERA staff nor the Exchange observed any significant economic impact on the underlying index or related product.

The Exchange also believes the introduction of FLEX PM options had no significant impact on the market quality of corresponding A.M.-settled options or other options. As discussed above, the Exchange's analysis conducted after the introduction of SPXW options with Tuesday and Thursday expirations demonstrated no statistically significant impact on the bid-ask or effective spreads of SPXW options with Monday, Wednesday, and Friday expirations after trading in the SPXW options with Tuesday and Thursday expirations began. As noted above, the Exchange acknowledges the above analysis, due to the type of study performed, may not be used as a direct substitute to demonstrate that the introduction of FLEX PM Third Friday Options did not significantly impact the market quality of non-FLEX A.M.-settled options. However, the Exchange believes the analysis is relevant. Since 2013, approximately 400,000 contracts in FLEX PM Third Friday Options have executed on the Exchange, compared to 156 million total FLEX Options contracts; 14.2 billion total options contracts; 5.6 billion index option contracts; 3.8 billion total SPX options contracts; and 2.3 billion A.M.-settled SPX options contracts in the same time period. This equates to an ADV of under 150 contracts for FLEX PM Third Friday Options compared to an ADV of over 800,000 contracts for SPX options over that time. As noted above, the Exchange's analysis demonstrated the introduction of SPXW options with Tuesday and Thursday expirations did not significantly impact the market quality of non-FLEX SPX P.M.-options. Given that the Exchange determined that the introduction of SPXW options with Tuesday and Thursday expirations had no significant impact on the market quality of non-FLEX SPX A.M.-settled options, the Exchange believes it is logical and reasonable to conclude that

[66] *See supra* note 29.

[67] *See supra* notes 37–51.

[68] The Exchange acknowledges that, while FLEX PM Third Friday Options has historically represented a very small percentage of overall volume, it is possible trading in these options may grow in the future.

it is unlikely that the introduction of FLEX PM Third Friday Options (which has an ADV of approximately 0.04% the size of the ADV of SPXW Tuesday and Thursday expirations) [69] would have any impact on the market quality of non-FLEX SPX A.M.-settled options.

The Exchange believes it is fair to assume there is likely no measurable impact on that market for several reasons: (1) as noted above, the volume in the FLEX PM Third Friday Options is a minute fraction (0.02%) of SPX options with A.M.-settlement; (2) FLEX Options are not quoted on a continuous basis, so Market-Makers do not need to estimate the risk associated with the potential trade as they do with options they are continuously quoting in the non-FLEX Options market; and (3) the FLEX market requires either verbal responses on the trading floor or auction responses electronically to represented orders, which provides Market-Makers with time to decide whether to trade, something which does not occur for the thousands of series they continuously quote in the non-FLEX Options market.

The Exchange evaluated each FLEX PM Third Friday Options trade for more than 500 contracts [70] that occurred on the Exchange during the last two years [71] and analyzed the market quality (specifically, the average time-weighted quote spread and size 30 minutes prior to the trade and the average time-weighted quote spread and size 30 minutes after the trade) of series non-FLEX a.m.-settled options overlying the same index with similar terms as the FLEX PM Third Friday Option that traded (time to expiration, type (call or put), and strike price) as set forth in the table above. Given that the above-table shows that the spreads were relatively stable before and after large trades, the Exchange believes this demonstrates that large FLEX PM Third Friday Options trades had no material negative impact (and the Exchange believes likely no impact) on quote quality of non-FLEX a.m.-settled options overlying the same index with similar terms as the FLEX PM Third Friday Option. Therefore, the Exchange believes this evaluation effectively demonstrates it is likely that FLEX PM Third Friday Options have had no significant negative impact on the market quality of non-FLEX Options with A.M.-settlement.[72]

As discussed above, the Exchange believes that evaluation effectively demonstrates that FLEX PM Third Friday Options have had no significant negative impact on the market quality of non-FLEX Options with A.M.-settlement.

Additionally, the significant changes in the closing procedures of the primary markets in recent decades, including considerable advances in trading systems and technology, has significantly minimized risks of any potential impact of FLEX PM Third Friday Options on the underlying cash markets. As such, the Exchange believes that a permanent Pilot Program does not raise any unique or prohibitive regulatory concerns and that such trading has not, and will not, adversely impact fair and orderly markets on Expiration Fridays for the underlying indexes or their component securities. Further, as the Exchange has not identified any significant impact on market quality or any unique or prohibitive regulatory concerns as a result of offering FLEX PM Third Friday Options, the Exchange believes that the continuation of the Pilot Program as a pilot, including the gathering, submission and review of the pilot reports and data, is no longer necessary and that making the Pilot Program permanent will allow the Exchange to otherwise allocate time and resources to other industry initiatives.

B. Self-Regulatory Organization's Statement on Burden on Competition

Cboe Options does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that making the Pilot Program permanent will impose any unnecessary or inappropriate burden on intramarket competition because FLEX PM options will continue to be available to all market participants who wish to participate in the FLEX PM options market. The Exchange believes that the growth that the P.M.-settled options market, including FLEX PM options, has experienced since their reintroduction through pilot programs indicates strong, continued investor interest and demand, warranting a permanent Pilot Program. The Exchange believes that, for the period that P.M.-settled FLEX options have been in operation as pilot programs, they have provided investors with a desirable product with which to trade and wishes to permanently offer this product to investors. Furthermore, during the pilot period, the Exchange has not observed any significant adverse market effects nor identified any regulatory concerns as a result of the Pilot Program, and, as such, the continuation of the Pilot Program as a pilot, including the gathering, submission and review of the pilot reports and data, is no longer necessary—a permanent Pilot Program will allow the Exchange to otherwise allocate time and resources to other industry initiatives.

The Exchange further does not believe that making the Pilot Program permanent will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it applies to a class of options listed only for trading on Cboe Options. The Exchange notes that other exchanges are free to and do offer competing products. To the extent that the permanent offering and continued trading of FLEX PM Third Friday Options may make Cboe Options a more attractive marketplace to market participants at other exchanges, such market participants may elect to become Cboe Options market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[73] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with section 6(b)(5) of the Act,[74] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and

[69] The Exchange acknowledges that, while FLEX PM Third Friday Options has historically represented a very small percentage of overall volume, it is possible trading in these options may grow in the future.

[70] The Exchange believes it is reasonable to consider only these large trades, because if large trades had no significant impact on market quality, then it is unlikely that smaller trades would have had a significant impact on market quality.

[71] The Exchange believes it is reasonable to use data from this time period as representative of the entire pilot period given that volume in FLEX PM Third Friday Options remained consistently low throughout the entire pilot period.

[72] The Exchange acknowledges that, while FLEX PM Third Friday Options has historically represented a very small percentage of overall volume, it is possible trading in these options may grow in the future.

[73] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[74] 15 U.S.C. 78f(b)(5).

practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In its proposal to make the Pilot Program permanent, the Exchange addressed whether the Pilot Program negatively impacts markets or impacted options market quality.[75] Each of these elements is discussed in greater detail below. As stated above, no comments were received on the proposed rule change.

Market Impact Considerations

The Exchange states it has not identified any evidence from the pilot data indicating that the trading of PM-settled FLEX options has any adverse impact on fair and orderly markets on Expiration Fridays for broad-based indexes or the underlying securities comprising those indexes and has observed no abnormal market movements attributable to FLEX PM Third Friday Options from any market participants that have come to the attention of the Exchange.[76] In order to support its overall assessment of the Program, the Exchange included a review and analysis of pilot data.[77] Among other things, the Exchange's analysis includes end of day volatility as well as a comparison of the impact of quarterly index rebalancing versus PM-settled expirations.[78]

In addition to reviewing the data and analysis provided by the Exchange, the Commission reviewed the analysis in the Pilot Memo, which evaluates whether higher levels of expiring open interest in PM-settled index options results in increased volatility and price reversals around the close. The Pilot Memo shows that the market share for PM-settled options on the S&P 500 has grown substantially since 2007.[79] The Exchange's review of pilot data also showed this trend continuing from 2019 through 2021.[80]

The Pilot Memo examines whether and to what extent expiring open interest in PM-settled index options is empirically related with the tendency of the corresponding index futures, the underlying index, or index components to experience increased transitory volatility and price reversals around the time of market close on expiration dates. The Pilot Memo concludes that, although expiring PM-settled index option open interest may have a statistically significant relationship with volatility and price reversals of the underlying index, index futures, and index component securities around the market close, the magnitude of the effect is economically very small.[81] For example, the largest settlement event that occurred during the time period studied in the Pilot Memo (a settlement of $100.4 billion of notional on December 29, 2017) had an estimated impact on the futures price of only approximately 0.02% (a predicted impact of $0.54 relative to a closing futures price of $2,677).[82]

The Exchange further reviewed a sample of pilot data from 2019 through 2021, and measured the volatility of the S&P 500 over the final fifteen minutes of each trading day and compared expiration days to non-expiration days.[83] Generally volatility was slightly higher on expiration days, but in cases where overall market volatility increased, the normalized impact on expiration days versus non-expiration days remained consistent.[84] The Exchange further analyzed volatility on days when the S&P 500 was rebalanced, and states its results suggest more closing volatility on rebalance dates compared to non-rebalance expiration dates, indicating that rebalancing of the S&P 500 may have a greater impact on S&P 500 volatility than p.m.-settled option expirations.[85]

The Exchange also reviewed a sample of post-2018 pilot data for potential correlation between excess market volatility and price reversals and the hedging activity of liquidity providers.[86] To determine whether there is a correlation, the Exchange calculated an estimate of the amount of MOC volume in the S&P 500 component markets attributable to expected hedging activity as a result of expiring in-the-money options.[87] The Exchange states its results indicate that other sources of MOC share volume generally exceed the volume resulting from hedging activity for PM-settled SPX options.[88] Further, the Exchange also compared hedging futures positions that would correspond to expiring in-the-money PM-settled SPX options and concludes the data indicate negligible capacity for hedging activity to increase volatility in the underlying markets.[89]

The Exchange acknowledged in its proposal that the Commission's Pilot Memo and corresponding Exchange studies discussed above specifically evaluated SPX options rather than FLEX PM Third Friday Options.[90] To support its reliance on these studies, the Exchange states that there have been approximately 400,000 contracts in FLEX PM Third Friday Options executed on the Exchange since 2013, that vast majority of which were on SPX, representing approximately 0.01% of all SPX options volume during that time.[91] The Exchange further states that given that the Pilot Memo and other Exchange studies concluded that PM settlements of a significantly larger amount of non-FLEX PM-settled index options had no significant adverse market impact on the underlying index or related products, it is reasonable to conclude that the small amount of expiring PM settled FLEX index options under the Pilot Program, ''. . .would similarly have no significant adverse market impact.'' [92]

Finally, the Exchange states that the significant changes in the closing procedures of the primary markets in recent decades, including considerable advances in trading systems and technology, have significantly minimized risks of any potential impact of PM-, cash-settled SPX options on the underlying cash markets.[93]

Market Quality Considerations

The Exchange also completed an analysis intended to evaluate whether the Pilot Program impacted the quality of the SPX options market. Specifically,

[75] Certain studies cited by the Exchange do not include, as part of their analysis, FLEX Options. *See* Amendment No. 3. However, the Commission acknowledges that the market for FLEX Options is small and the products included as part of those studies, while much larger than the FLEX market, did not have a disruptive impact on the underlying indexes or the underlying components. As a result, the Commission recognizes that it is not unreasonable for the Exchange to infer that since the FLEX PM Third Friday Options market is significantly smaller than the SPX PM market, FLEX PM Third Friday Options are unlikely to adversely impact the market.

[76] *See* Amendment No. 3, at 12–13.

[77] *Id.* at 17.

[78] *Id.* at 13. The Exchange states that although its analysis specifically evaluated SPX options, the Exchange believes it is appropriate to extrapolate the data to apply to FLEX PM Third Friday Options. *See* Amendment No. 3, at 29. The Commission agrees it is appropriate to extrapolate the data to FLEX PM Third Friday Options, as the Exchange's analysis examines liquidity and volatility dynamics around the market close, which may be associated with typical hedging activities tied to expiring p.m.-settled index option.

[79] *See* Pilot Memo at 2.

[80] *See* Amendment No. 3, at 13. Specifically, since 2007, PM-settled SPX options grew from 0.1% of open interest to 30% of open interest in 2021. *Id.*

[81] *See* Pilot Memo at 3.

[82] *See id.*

[83] *See* Amendment No. 3, at 17–19.

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See* Amendment No. 3, at 20.

[89] *See id.*

[90] *See* Amendment No. 3, at 29.

[91] *See id.*

[92] *See* Amendment No. 3, at 30.

[93] *See* Amendment No. 3, at 26.

the Exchange compared values of key market quality indicators (specifically, the bid-ask spread [94] and effective spread [95]) in PM-settled SPX weekly (''SPXW'') options both before and after the introduction of Tuesday expirations and Thursday expirations for SPXW options on April 18 and May 11, 2022, respectively.[96] The Exchange concludes from this analysis that the introduction of SPX options with Tuesday and Thursday options had no significant impact on the market quality of SPXW options with Monday, Wednesday, and Friday expirations. For a majority of the series analyzed, the Exchange observed no statistically significant difference in bid-ask spread or effective spread.[97] While the Exchange acknowledges that this analysis may not be a direct substitute to demonstrate that the introduction of FLEX PM Third Friday Options did not significantly impact the market quality of non-FLEX AM-settled options the Exchange believes the analysis is still relevant.[98]

Specifically, the Exchange states the data shows that 400,000 FLEX PM Third Friday Options have executed on the Exchange since 2013; compared to 156 million total FLEX Options contracts; 14.2 billion total options contracts; 5.6 billion index option contracts; 3.8 billion total SPX options contracts; and 2.3 billion AM-settled SPX options contracts in the same time period.[99] The Exchange states that since FLEX PM Third Friday Options have an average-daily-volume of approximately 0.04% of the average-daily-volume of SPXW Tuesday and Thursday expirations, it is reasonable to conclude that it is unlikely that FLEX PM Third Friday Options would have any impact on the market quality of non-FLEX SPX AM-settled options.[100]

As part of its filing, to further analyze the impact FLEX PM Third Friday Options had on market quality, the Exchange provided additional data and evaluated each FLEX PM Third Friday Options trade for more than 500 contracts that occurred on the Exchange during the last two years and analyzed the market quality (specifically, the average time-weighted quote spread and size 30 minutes prior to the trade and the average time-weighted quote spread and size 30 minutes after the trade) of non-FLEX AM-settled SPX option series with similar terms as the FLEX PM Third Friday Option that traded (time to expiration, type (call or put), and strike price) as set forth in the table above.

The Exchange's analysis shows that the average time-weighted quote spread and size of non-FLEX AM-settled SPX option did not materially change after the FLEX PM Third Friday Options trade.[101] Specifically, the average time-weighted quoted spread was never more than $0.36 wider in the time period after the trade compared to before the trade, and the average time-weighted size was never more than 0.7 contracts different in the time period after the trade compared to before the trade.[102] The Exchange also stated that the observed spreads were relatively stable before and after large trades. The Exchange states that this demonstrates that large FLEX PM Third Friday Options trades had no material negative impact on quote quality of non-FLEX AM-settled SPX options with similar terms as the FLEX PM Third Friday Options.[103] Therefore, the Exchange concludes that this evaluation effectively shows that it is likely FLEX PM Third Friday Options have had no significant negative impact on the market quality of non-FLEX Options with AM-settlement.[104]

Conclusion

The Commission believes that the evidence contained in the Exchange's filing, and the Exchange's pilot data and reports, demonstrate that the Pilot Program has benefitted investors and other market participants by providing more flexible trading and hedging opportunities using FLEX options under the Pilot Program, while also having observed no evidence of an adverse impact on the market. The market for FLEX PM Third Friday Options has grown in size over the course of the Pilot Program, but remains relatively small compared to non-FLEX PM-settled index options, and analysis of the pilot data did not identify any significant economic impact, nor did it indicate a deterioration in market quality (as measured by average time weighted quote spreads and average time weighted quote size) for series of non-FLEX AM-settled SPX option series with similar terms as the FLEX PM Third Friday Options. Additionally, the Pilot Memo and Exchange studies analyzing the non-Flex options market did not identify any adverse market impact on the underlying indexes, components of those indexes or related products or any significant impact on market quality of AM-settled index options.[105] Further, significant changes in closing procedures in the decades since index options moved to AM settlement may also serve to mitigate the potential impact of PM-settled index options on the underlying cash markets.

Accordingly, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with section 6(b)(5) of the Act [106] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Solicitation of Comments on Amendment No. 3 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 3 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CBOE–2023–018 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CBOE–2023–018. This file number should be included on the subject line if email is used. To help the Commission process and review your

[94] The Exchange calculated for each of SPXW options (with Monday, Wednesday, and Friday expirations) and SPY Weekly options (with Monday, Wednesday, and Friday expirations) the daily time-weighted bid-ask spread on the Exchange during its regular trading hours session, adjusted for the difference in size between SPXW options and SPY options (SPXW options are approximately ten times the value of SPY options).

[95] The Exchange calculated the volume-weighted average daily effective spread for simple trades for each of SPXW options (with Monday, Wednesday, and Friday expirations) and SPY Weekly options (with Monday, Wednesday, and Friday expirations) as twice the amount of the absolute value of the difference between an order execution price and the midpoint of the national best bid and offer at the time of execution, adjusted for the difference in size between SPXW options and SPY options.

[96] For purposes of comparison, the Exchange paired SPXW options and SPY options with the same moneyness and same days to expiration.

[97] *See* Amendment No. 3, at 56.

[98] *Id.* at 23

[99] *Id.*

[100] *Id.*

[101] The Exchange acknowledged certain limitations related to its analysis. *See* Amendment No. 3, at notes 47–49.

[102] *See* Amendment No. 3, at 25.

[103] *Id.*

[104] *Id.*

[105] While the Exchange recognized certain limitations as to its analysis, given the totality and scope of the studies described above and the current size of the FLEX PM Third Friday Options market it is not unreasonable for the Exchange to infer from those studies that it is unlikely FLEX PM Third Friday Options adversely impacted the options or other markets.

[106] 15 U.S.C. 78f(b)(5).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CBOE–2023–018 and should be submitted on or before January 18, 2024.

V. Accelerated Approval of Amendment No. 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 3 in the **Federal Register**. As noted above, Amendment No. 3 makes no substantive changes to the proposal. Amendment No. 3 provides additional analysis and data to support certain assertions made by the Exchange and provides greater clarity to, and justification for, the proposal.[107] The additional analysis and information in Amendment No. 3 assist the Commission in evaluating the Exchange's proposal and in determining that it is consistent with the Act. Amendment No. 3 also raises no new novel issues. Accordingly, the Commission finds good cause, pursuant to section 19(b)(2) of the Act,[108] to approve the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

[107] *See supra* note 12.

[108] 15 U.S.C. 78s(b)(2).

VI. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that proposed rule change SR–CBOE–2023–018, as modified by Amendment No. 3, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[109]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28608 Filed 12–27–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99231; File No. SR–NYSEAMER–2023–66]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Modify Rule 900.3NYP

December 22, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 19, 2023, NYSE American LLC (''NYSE American'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify Rule 900.3NYP (Orders and Modifiers) to adopt electronic Customer Cross Order and Complex Customer Cross Order functionality and to amend Rule 900.2NY (Definitions) to specify the treatment of certain Professional Customer interest. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[109] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify Rule 900.3NYP (Orders and Modifiers) to adopt electronically-entered Customer Cross (''C2C'') Orders and Complex Customer Cross (''Complex C2C'') Orders (collectively, ''Customer Cross Orders''). The Exchange also proposes to amend the definition of Professional Customer (Rule 900.2NY) to specify that, for purposes of proposed Rule 900.3NYP(g)(2) and Rule 971.1NYP, Professional Customer interest would be treated in the same manner as Broker/Dealers (non-Customers).

Proposed Rule 900.3NYP(g)(2): Customer Cross Orders

Rule 934NY(a) describes Customer-to-Customer Cross orders on the Trading Floor wherein ''[a] Floor Broker who holds a Customer order to buy and a Customer order to sell the same option contract may cross such orders,'' provided that the Floor Broker proceeds in the manner set forth in paragraphs (1)–(3) of Rule 934NY(a).[4] The Exchange proposes to adopt rules governing electronically-entered Customer Cross Orders, which allow ATP Holders to conduct this type of crossing transaction electronically and without having to utilize a Floor Broker. Although the proposed Customer Cross Orders are conceptually the same as the existing Customer-to-Customer Cross, the latter order type differs in that it must adhere

[4] As discussed *infra,* Professional Customer volume is not eligible to be included on a Customer-to-Customer Cross submitted pursuant to Rule 934NY(a). *See* Rule 900.2NY (providing in relevant part that, for purposes of Rule 934NY (Crossing), Professional Customers are treated as Broker/Dealers).

to Floor-specific open outcry rules.[5] The Exchange notes that the proposed Customer Cross Order types are consistent with customer crossing functionality available on another options exchange.[6]

Proposed Rule 900.3NYP(g)(2) would describe Customer Cross Orders. Proposed Rule 900.3NYP(g)(2)(A) would provide that a C2C Order and a Complex C2C Order must be comprised of a Customer (but not a Professional Customer) order to buy and a Customer (but not a Professional Customer) order to sell at the same price and for the same quantity. The proposal to limit eligible interest to Customer but not Professional Customer interest is consistent with the rules of another options exchange.[7] In addition, as proposed, a C2C Order or Complex C2C Order that is not rejected on arrival would immediately trade in full at its limit price.[8] Further, proposed Rule 900.3NYP(g)(2)(A) would provide that C2C Orders and Complex C2C Orders would not route and may be entered with a Minimum Price Variation (''MPV'') of $0.01 regardless of the MPV of the options series.[9] Finally, the proposed Rule would specify that Commentary .01 to Rule 935NY would apply to Customer Cross Orders, which means that ATP Holders may not utilize Customer Cross Orders to increase their economic gain without first giving other trading interest on the Exchange an opportunity to participate in the trade or to trade at the transaction price when the ATP Holder was already bidding or offering at that price.[10] This proposed handling would align with at least one other options exchange that offers customer crossing orders.[11]

Proposed Rule 900.3NYP(g)(2)(B) provides that a C2C Order that has one option leg would be rejected if received when the NBBO is crossed or if the C2C would trade at a price that (i) is at the same price as a displayed Customer order on the Consolidated Book and (ii) is not at or between the NBBO and the Exchange BBO. The Exchange believes that the proposal would provide for the efficient entry and execution of C2C Orders while continuing to protect same-priced, displayed Customer interest (*i.e.,* by ensuring that the C2C Order does not trade ahead of displayed Customer interest resting in the Consolidated Book). As noted above, the proposed C2C Orders would operate in a manner that is consistent with the handling of single-leg customer cross orders on another options exchange.[12]

Proposed Rule 900.3NYP(g)(2)(C) would describe the Exchange's pricing requirements for a Complex C2C Order. To validate the price of a Complex C2C Order, the Exchange would rely on the Derived BBO (''DBBO'') as described in Rule 980NYP(a)(5).[13] If the Exchange is not able to calculate the DBBO for a complex strategy because of one of the circumstances described in Rule 980NYP(a)(5)(B)–(C), the Exchange will not execute an order for that strategy until the circumstance is resolved.[14] Consistent with this handling, the Exchange proposes that it would reject a Complex C2C Order if the Exchange is unable to calculate the DBBO for a leg of the Complex C2C Order per Rule 980NYP(a)(5)(B) or (a)(5)(C).[15]

In addition, proposed Rule 900.3NYP(g)(2)(C) provides that no option leg of a Complex C2C Order will trade at a price worse than the Exchange BBO and such order would be rejected if it fails to meet the following requirements:

- the transaction price must be at or between the DBBO and may not equal the DBBO if the DBBO is calculated using the Exchange BBO and the Exchange BBO of any component of the complex strategy on either side of the market includes displayed Customer interest. If the DBB (DBO) includes a displayed Customer interest on the Exchange, the transaction price must improve the DBB (DBO) by at least one cent ($0.01). This proposed requirement is consistent with price parameters applied to complex customer cross orders on another options exchange; [16] and
- the transaction price must be at or between the best-priced Complex Orders to buy and sell in the complex strategy and may not equal the price of a resting Customer Complex Order, which proposed requirement is consistent with price parameters required for complex customer cross orders on another options exchange.[17]

The Exchange also proposes a conforming change to Rule 980NYP(b)(1) to include Complex Customer Cross Orders among the type of Electronic Complex Orders available for trading on the Exchange, which change would add clarity, transparency, and internal consistency to Exchange rules.[18]

[5] *See, e.g.,* Rule 934NY(a)(3)(A) and (C) (each of which require that the Customer-to-Customer Cross comply with the other Exchange open outcry rules).

[6] *See* Cboe Exchange, Inc. (''Cboe'') Rules 5.37(f) and 5.38(f) (providing the requirements for Customer-to-Customer AIM/C–AIM Immediate Crosses to bypass Cboe's Automated Improvement Mechanism (AIM)/Complex Automated Improvement Mechanism (C–AIM), respectively, and immediately execute).

[7] *See* Cboe Rule 5.37(f) and Rule 5.38(f) (providing that each side of a ''Customer-to-Customer Immediate Cross,'' for single-leg and complex orders, respectively, must be for the account of a ''Priority Customer''). Cboe defines a Priority Customer as ''a person or entity that is a Public Customer and is not a Professional.'' See Cboe Rule 1.1.

[8] *See* proposed Rule 900.3NYP(g)(2)(A) (providing, in relevant part, that ''[a] C2C Order or Complex C2C Order that is not rejected per Rule 900.3NYP(g)(2)(B) [Execution of C2C Orders] or (C) [Execution of Complex C2C Orders], respectively, will immediately trade in full at its price'').

[9] Rule 900.2NY defines ''Minimum Price Variation'' or ''MPV'' as the price variations established by the Exchange, which for quoting and trading options traded on the Exchange are set forth in Rule 960NY.

[10] *See* proposed Rule 900.3NYP(g)(2)(A). *See also* Rule 935NY, Commentary .01.

[11] *See* Cboe Interpretation and Policy .03 to Rules 5.37 and 5.38 (providing an identical prohibition in each Cboe rule—which prohibition is identical to Rule 935NY, Commentary .01 and prevents order-senders from using the customer crossing mechanism to increase economic gain without first providing an opportunity of eligible interest to trade at the transaction price of the cross order).

[12] *See* Cboe Rule 5.37(f) (stating that Customer-to-Customer Immediate Cross comprised of ''Priority Customer'' orders will immediately execute provided that the execution (i) is ''at or between the BBO and the NBBO'' and (ii) ''is not at the same price as any Priority Customer Order resting on the Book.'').

[13] The DBBO provides for the establishment of a derived (theoretical) bid or offer for a particular complex strategy. *See* Rule 980NYP(a)(5) (defining the DBBO and providing that the bid (offer) price used to calculate the DBBO on each leg will be the Exchange BB (BO) (if available), bound by the maximum allowable Away Market Deviation). The Away Market Deviation, as defined in Rule 980NYP(a)(1), ensures that an ECO does not execute too far away from the prevailing market. Rule 980NYP(a)(5) also provides for the establishment of the DBBO in the absence of an Exchange BB (BO), or ABB(ABO), or both.

[14] *See* proposed Rule 900.3NYP(g)(2)(C). *See also* Rule 980NYP(a)(5)(B) (providing that, ''[i]f, for a leg of a complex strategy, there is neither an Exchange BBO nor an ABBO, the Exchange will not allow the complex strategy to trade until, for that leg, there is either an Exchange BB or BO, or an ABB or ABO, on at least one side of the market'') and (a)(5)(C) (providing, in relevant part that, ''[i]f the best bid and offer prices (when not based solely on the Exchange BBO) for a component leg of the complex strategy are locked or crossed, the Exchange will not allow an ECO for that strategy to execute against another ECO until this condition resolves'').

[15] *See* proposed Rule 900.3NYP(g)(2)(B).

[16] *See* Cboe Rule 5.38(f)(i) (providing, in relevant part, that the transaction price of a Complex Customer Cross Order must be ''at or between the SBBO [Synthetic Bid or Offer] and may not equal either side of the SBBO if the BBO of any component of the complex strategy represents a Priority Customer''). Cboe's concept of the SBBO is analogous to the Exchange's concept of the DBBO. *See* Cboe Rule 5.33.

[17] *See* Cboe Rule 5.38(f)(ii) (providing, in relevant part, that the transaction price of a Complex Customer Cross Order must be ''at or between the best-priced complex orders in the complex strategy'' on Cboe ''and may not equal the price of a Priority Customer complex order'' resting on either side of the COB'').

[18] *See* proposed Rule 980NYP(b)(1) (providing that Electronic Complex Orders ''may be entered as Limit Orders, Limit Orders designated as Complex Only Orders, Complex QCCs, *or as Complex Customer Cross Orders*) (emphasis added).

Rule 900.2NY: Definitions of Customer and Professional Customer

Rule 900.2NY defines a ''Customer'' as ''an individual or organization that is not a Broker/Dealer; when not capitalized, 'customer' refers to any individual or organization whose order is being represented, including a Broker/Dealer.'' Rule 900.2NY defines a ''Professional Customer'' as ''an individual or organization that (i) is not a Broker/Dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).'' [19] Included in the definition of Professional Customer is a list of Exchange Rules, including Rule 934NY (Crossing), for purposes of which Professional Customers are treated in the same manner as Broker/Dealers (or non-Customers).[20] Accordingly, Professional Customers are treated as Broker/Dealers (or non-Customers) for purposes of Crossing Orders executed pursuant to Rule 934NY. As such, Professional Customer volume is not eligible to be executed as part of a Customer-to-Customer Cross executed on the Trading Floor per Rule 934NY(a).

The Exchange proposes to amend Rule 900.2NY to include proposed Rule 900.3NYP(g)(2) in the list of Exchange Rules pursuant to which Professional Customers are treated in the same manner as Broker/Dealers (or non-Customers).[21] This proposed handling of non-Customer interest for purposes of the proposed Customer Cross Orders would align with the handling of such interest for purposes of Customer-to-Customer Cross Orders executed on the Trading Floor per Rule 934NY(a) and would therefore promote internal consistency in Exchange rules. In addition, excluding Professional Customer orders from being eligible to trade as part of the proposed Customer Cross Orders would put the Exchange on equal footing with at least one other options exchange that likewise disallows such Professional interest from being executed as part of customer cross orders.[22]

Finally, the Exchange believes this proposed change would add clarity, transparency, and internal consistency to Exchange rules.

Professional Customers in the Customer Best Execution (''CUBE'') Auctions

As noted above, Rule 900.2NY defines ''Professional Customer'' as ''an individual or organization that (i) is not a Broker/Dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).'' [23] Included in the definition of Professional Customer is a list of Exchange Rules pursuant to which Professional Customers are treated in the same manner as Broker/Dealers (or non-Customers). Among the rules on this list is Rule 971.1NY, which means that for purposes of single-leg CUBE Auctions, Professional Customer interest is treated as Broker/Dealer (non-Customer) interest.[24] The Exchange recently migrated to the Pillar trading platform and Rule 971.1NY no longer applies to CUBE Auctions; instead, CUBE Auctions on Pillar are governed by Rule 971.1NYP (''the Pillar CUBE Rule'').[25]

The Exchange proposes to amend Rule 900.2NY to treat Professional Customer interest submitted to CUBE Auctions pursuant to the Pillar CUBE Rule in the same manner as such interest was handled when submitted to CUBE Auctions pursuant to Rule 971.1NY.[26] The Exchange believes that this proposal would ensure consistent handling of Professional Customer interest in the CUBE Auction prior to and after the Exchange's migration to Pillar and would continue to afford Customer interest priority over non-Customer interest for purposes of the Exchange's price improvement auction. The Exchange notes that at least one other options exchange likewise treats Professional Customer interest as Broker/Dealer (non-Customer) interest for purposes of their price improvement auction.[27]

Implementation

Because of the technology changes associated with this proposed rule change, the Exchange will announce the implementation date by Trader Update, which, subject to effectiveness of this proposed rule change, is anticipated to be in the first quarter of 2024.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934,[28] in general, and furthers the objectives of Section 6(b)(5),[29] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed Customer Cross Orders (for single-leg and complex interest) would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rules would allow market participants to electronically trade these types of crossing orders on the Exchange. The proposed functionality would benefit investors and the public interest because it would enhance and automate each order entry firms' ability to submit two-sided Customer orders—*i.e.,* Customer Cross Orders (both single-leg and complex). As such, the proposed rule change would provide market participants with an efficient means of executing their Customer orders. In addition, the proposed Customer Cross Orders would remove impediments to and perfect the mechanism of a free and open market and a national market system because market participants would be given an additional way to execute single-leg and Complex Orders on the Exchange. As noted herein, at least one other competing options exchange—Cboe—offers substantially similar customer crossing orders for single-leg and complex trading

[19] *See* Rule 900.2NY (defining a Professional Customer).

[20] *See supra* note 4 (citing Rule 900.2NY, which specifies that for purposes Rule 934NY(Crossing) Professional Customer interest will be treated in the same manner as a Broker/Dealer (or non-Customer) interest). *See id.* (defining Professional Customer).

[21] *See* proposed Rule 900.2NY (including proposed Rule 900.3NYP(g)(2) (Customer Cross Orders and Complex Customer Cross Orders) among the list of Exchange Rule pursuant to which Professional Customer interest is treated in the same manner as a Broker/Dealer (or non-Customer) interest).

[22] As noted *supra,* only ''Priority Customers'' on Cboe may participate in ''Customer-to-Customer Immediate Cross.'' *See* Cboe Rules 5.37(f) and Rule 5.38(f).

[23] *See* Rule 900.2NY (defining a Professional Customer).

[24] *See* Trader Update, NYSE American Options: NYSE Pillar Final Migration Tranche, dated October 30, 2023, available here: *https://www.nyse.com/trader-update/history#110000748137* (announcing the last phrase of the Pillar migration).

[25] *Compare* Rule 971.1NY *with* the Pillar CUBE Rule. *See also* Securities Exchange Act Release No. 97938 (July 18, 2023), 88 FR 47536 (July 24, 2023) (NYSEAmer–2023–35) (adopting Pillar Rule 971.1NYP (Single-Leg Electronic Cross Transactions) on an immediately effective basis).

[26] *See* proposed Rule 900.2NY (providing in relevant part, that for purposes of *Rule 971.1NYP* (Single-Leg Electronic Cross Transactions), ''[a] Professional Customer will be treated in the same manner as a Broker/Dealer (or non-Customer) in securities'') (emphasis added).

[27] *See* Cboe Rule 5.38(e) (providing that ''Priority Customer'' interest executes first with the Agency Order submitted to the price improvement auction, followed by non-Priority Customer interest).

[28] 15 U.S.C. 78f(b).

[29] 15 U.S.C. 78f(b)(5).

interest.[30] With this proposal, market participants would likewise have an additional venue on which to execute two-sided Customer orders electronically—*i.e.,* Customer Cross Orders. As such, the proposed order types may attract additional Customer order flow (both two-sided and single-sided) to the Exchange, which may, in turn, result in greater liquidity available for trading on the Exchange.

Regarding the proposed single-leg C2C Order type, the Exchange believes that the adoption of this order type would provide for the efficient entry and execution of C2C Orders while continuing to protect same-priced, displayed Customer interest (*i.e.,* by ensuring that the C2C Order does not trade ahead of displayed Customer interest resting in the Consolidated Book). Further, as noted herein, the proposed order type is not new or novel because each C2C Order would operate in a manner that is consistent with single-leg customer cross orders that are available on another options exchange.[31]

The proposed Complex C2C Order would protect investors and the public interest by assuring that these orders comply with the existing priority and allocation rules applicable to the processing and execution of Complex Orders per Rule 980NYP. In particular, the proposed Complex C2C Orders would continue to protect same-priced, displayed Customer interest and would ensure that Complex C2C Orders do not trade ahead of such displayed Customer interest, whether in the leg markets or as Customer Complex Orders. The Exchange believes the proposed Complex C2C Orders would promote just and equitable principles of trade because (as discussed herein) the proposed orders—which are not new or novel—would operate in a manner that is consistent with complex customer cross orders that are available on another options exchange.[32]

Finally, the proposed change to the definition of Professional Customer to make clear that Professional Customers are treated as Broker/Dealers (or non-Customers) for purposes of the proposed Customer Crosses Orders and Single-Leg Electronic Cross Transactions, per Rule 971.1NYP would remove impediments to and perfect the mechanism of a free and open market and a national market system and would protect investors and the public interest because such changes would ensure consistent handling of Professional Customer interest in the CUBE Auction prior to and after the Exchange's migration to Pillar and would align Exchange rules with the rules of another options exchange that likewise differentiates the treatment of Professional Customer interest from Customer interest for purposes of customer crossing orders and for price improvement auctions, where Customers (but not Professional Customers) are afforded first priority to trade in the auction.[33]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange's proposal to adopt a new electronically-entered crossing order type (*i.e.,* the Customer Cross Order) would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed change would not impose a burden on intramarket competition because the proposed order types would provide all market participants on the Exchange with the option of utilizing another means of executing two-side Customer interest—both single-leg and Complex Orders on the Exchange. The proposed change would also benefit investors by providing another venue (*i.e.,* in addition to Cboe) on which Customer Cross Orders may be submitted electronically.

The Exchange believes that the proposed change would enhance inter-market competition by enabling the Exchange to compete for this type of order flow with at least one other options exchange that has similar rules and functionalities in place (*i.e.,* Cboe).[34] The Exchange believes that adopting Customer Cross Orders would promote competition as it would afford market participants another venue on which to execute two-sided Customer orders for single-leg and complex trading interest. Further, the Exchange anticipates that this proposal will create new opportunities for the Exchange to attract new business to the Exchange. As such, the Exchange believes that this proposal does not create an undue burden on intermarket competition. Rather, the Exchange believes that the proposed rule would bolster intermarket competition by promoting fair competition among individual markets.

The Exchange does not believe the proposed amendment to the definition of Professional Customer to include proposed Rule 900.3NYP(g)(2) among the rules pursuant to which Professional Customer interest is treated as Broker/Dealer (non-Customer) interest would impose any undue burden on intramarket or intermarket competition as all market participants on the Exchange would be subject to the updated definition. In addition, the proposal to limit the availability of Customer Cross Orders to interest submitted on behalf of Customers would align the Exchange with at least one other options exchange that had adopted a similar limitation.[35]

Similarly, the proposal to treat Professional Customer interest as Broker/Dealer (non-Customer) interest for purposes of the Pillar CUBE Rule would not impose any undue burden on intramarket or intermarket competition as use of the CUBE Auction, per the Pillar CUBE Rule, is optional. For those market participants that choose to utilize CUBE Auctions on Pillar (per Pillar Rule 971.1NYP), the proposed definition applies equally to all similarly-situated investors. In addition, all investors that opt to use the CUBE Auction would be subject to the same (amended) definition—which is consistent with the definition that applied to pre-Pillar Rule 971.1NY—and would also align the Exchange with at least one other options exchange that likewise affords priority in price improvement auctions to ''Priority Customers'' but not to Professional Customers.[36]

In addition, the proposed conforming change to include Complex Customer Cross Orders among the list of available Electronic Complex Orders set forth in Rule 980NYP(b)(1) would not impose an undue burden on intramarket or intermarket competition but would instead add clarity, transparency, and

[30] *See* Cboe Rules 5.37(f) and 5.38(f) (describing the analogous requirements for Cboe's single-leg and Complex Customer-to-Customer Immediate Crosses, respectively).

[31] *See* Cboe Rule 5.37(f) (describing the analogous requirements for Cboe's single-leg Customer-to-Customer Immediate Cross).

[32] *See* Cboe Rule 5.38(f) (describing the analogous requirements for Cboe's Complex Customer-to-Customer Immediate Cross).

[33] *See* Cboe Rule 5.37(e)–(f) and 5.38(e)–(f) (regarding the handling of Priority Customer interest for purposes of priority and allocation in Cboe's C–AIM Auction and for inclusion on customer crossing orders).

[34] *See* Cboe Rules 5.37(f) and 5.38(f) (describing the analogous requirements for Cboe's single-leg and Complex Customer-to-Customer Immediate Crosses, respectively.)

[35] *See id.*

[36] *See* Cboe Rule 5.37(e)–(f) and 5.38(e)–(f) (regarding the handling of Priority Customer interest for purposes of priority and allocation in Cboe's C–AIM Auction).

internal consistency to Exchange rules.[37]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A) of the Act[38] and Rule 19b–4(f)(6)[39] thereunder, the Exchange has designated this proposal as one that effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[40]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[41] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. Exchange Rule 934NY(a) currently provides for the trading of Customer-to-Customer Cross orders on the floor of the Exchange. The Exchange proposes to adopt Exchange Rule 900.3NYP(g)(2) to provide for the electronic trading of C2C and Complex C2C Orders. The proposed C2C and Complex C2C Orders, which must be comprised of a Customer (but not a Professional Customer) order to buy and a Customer (but not a Professional Customer) order to sell at the same price and for the same quantity, will trade immediately in full at their limit prices, provided that they satisfy the requirements in proposed Exchange Rule 900.3NYP(g)(2)(B) or (C), as applicable.[42] The Exchange states that the proposed C2C and Complex C2C Orders would allow the Exchange to make available to market participants without delay an additional and more efficient means of executing Customer orders on the Exchange, and an additional venue for electronically trading two-sided Customer single-leg and complex orders.

As discussed above, the proposed C2C and Complex C2C Orders are consistent with the customer-to-customer immediate cross and complex customer-to-customer immediate cross functionality available on another options exchange and do not raise new or novel regulatory issues.[43] Waiver of the operative delay will allow the Exchange to immediately provide market participants with an additional venue for electronically trading single-leg and complex customer cross orders. The proposal to amend Exchange Rule 900.2NY to add proposed Exchange Rule 900.3NYP(g)(2) to the list of Exchange rules pursuant to which Professional Customers are treated as Broker/Dealers (or non-Customers) will help to align the Exchange's rules with the rules of at least one other options exchange that limits its customer cross functionality to Priority Customer orders.[44] In addition, the definition of Professional Customer in Exchange Rule 900.2NY currently includes the CUBE Auction provided in Exchange Rule 971.1NY. The proposal to add the CUBE Auction in Exchange Rule 971.1NYP to the definition of Professional Customer will provide for consistent treatment of Professional Customer orders in the CUBE Auctions prior to and after the Exchange's migration to the Pillar trading platform. The proposal to add Complex Customer Cross Orders to Exchange Rule 980NYP(b)(1) will help to ensure that Exchange Rule 980NYP(b)(1) provides a complete and accurate list of the ECOs available on the Exchange. For these reasons, the Commission hereby waives the operative delay and designates the proposal operative upon filing.[45]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–NYSEAMER–2023–66 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEAMER–2023–66. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public

[37] *See* proposed Rule 980NYP(b)(1) (providing that Electronic Complex Orders (ECOs) ''may be entered as Limit Orders, Limit Orders designated as Complex Only Orders, Complex QCCs, *or as Complex Customer Cross Orders*) (emphasis added).

[38] 15 U.S.C. 78s(b)(3)(A).

[39] 17 CFR 240.19b–4(f)(6).

[40] In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[41] 17 CFR 240.19b–4(f)(6)(iii).

[42] *See* proposed Exchange Rule 900.3NYP(g)(2)(A). Proposed Exchange Rule 900.3NYP(g)(2)(B) provides, among other things, that a C2C Order will be rejected if it would trade at a price that is (i) at the same price as displayed Customer interest on the Consolidated Book; or (ii) not at or between the NBBO and the Exchange BBO. Proposed Exchange Rule 900.3NYP(g)(2)(C) provides, among other things, that no option leg of a Complex C2C Order will trade at a price that is worse than the Exchange BBO and that the transaction price must be at or between the DBBO and may not equal the DBBO if the DBBO is calculated using the Exchange BBO and the Exchange BBO for any component of the complex strategy on either side of the market includes displayed Customer interest.

[43] *See* Cboe Rules 5.37(f) and 5.38(f).

[44] *See id.* As discussed above, Professional Customers also are treated as Broker/Dealers (or non-Customers) for purposes of the Customer-to-Customer Cross orders traded on the Exchange's floor pursuant to Exchange Rule 934NY(a).

[45] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NYSEAMER–2023–66 and should be submitted on or before January 18, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[46]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28704 Filed 12–27–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99225; File No. SR–NYSE–2023–09]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the NYSE Listed Company Manual To Adopt Listing Standards for Natural Asset Companies

December 21, 2023.

I. Introduction

On September 27, 2023, New York Stock Exchange LLC (the ''Exchange'' or ''NYSE'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the NYSE Listed Company Manual (''Manual'') to adopt a new listing standard for the listing of Natural Asset Companies (''NAC''). The proposed rule change was published for comment in the **Federal Register** on October 4, 2023.[3] On November 7, 2023, pursuant to section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5]

This order institutes proceedings pursuant to section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change[7]

All statements in this Section II regarding the proposed rule change are taken from the description provided by the Exchange in the NAC Proposal.[8]

A. The NAC Proposal

The Exchange proposes to adopt a new subsection of Section 102 of the Manual (to be designated Section 102.09) to permit the listing of common equity securities of NACs. The Exchange proposes that, for purposes of proposed Section 102.09 of the Manual, a NAC is a corporation whose primary purpose is to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their production of ecosystem services.[9] As proposed, where doing so is consistent with the company's primary purpose, the NAC would seek to conduct sustainable revenue-generating operations. As proposed, sustainable operations are those activities that do not cause any material adverse impact on the condition of the natural assets under a NAC's control and that seek to replenish the natural resources being used. As proposed, NACs could also engage in other activities that support community well-being, provided such activities are sustainable.

The Exchange states that its proposal is intended to end the overconsumption of and underinvestment in nature, which requires bringing natural assets into the mainstream, and that NACs are a new concept pioneered by Intrinsic Exchange Group Inc. (''IEG''). According to the Exchange, IEG is a private company structured as a corporation organized under the laws of the State of Delaware that advises public sector and private landowners on the creation of NAC structures and strategies.

The Exchange proposes that NACs would be corporations that hold the rights to the ecological performance produced by natural or working areas, such as national reserves or large-scale farmlands, and have the authority to manage the areas for conservation, restoration, or sustainable management. The Exchange states that these rights could be licensed like other rights, including ''run with the land'' rights such as mineral rights, water rights, or air rights, and that NACs would be expected to license these rights from sovereign nations or private landowners.

Under the proposed amendments to the Manual, capital raised through an NYSE-listed NAC's initial public offering or follow-on offerings must be used to implement the conservation, restoration, or sustainable management plans articulated in its prospectus, fund its ongoing operations, or otherwise fulfill its purpose to maximize ecological performance (*i.e.,* the value of natural assets and the production of ecosystem services). As proposed, while the core purpose of a NAC would be to maximize ecological performance, a NAC would also be required to seek to conduct sustainable revenue-generating operations (*e.g.,* eco-tourism in a natural landscape or production of regenerative food crops in a working landscape) provided that such operations are consistent with the NAC's charter, do not cause any material adverse impact on the condition of the natural assets under the NAC's control, and seek to replenish the natural resources being used. Under the proposal, all NACs would be prohibited from directly or indirectly conducting unsustainable activities, such as mining, that lead to the degradation of the ecosystems it is trying to protect. In conducting its revenue-generating operations, a NAC could monetize ecosystem services that have markets (*e.g.,* through the sale of carbon credits). All revenues and expenses would be reported in the financial statements of the NAC prepared under generally accepted accounting principles (''GAAP'') and filed with the SEC as part of the NAC's required annual report on Form 10–K, 20–F or 40–F, as applicable. As

[46] 17 CFR 200.30–3(a)(12), (59).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 98665 (Sept. 29, 2023), 88 FR 68811 (Oct. 4, 2023) (SR–NYSE–2023–09) (''NAC Proposal''). Comments received on the NAC Proposal are available at *https://www.sec.gov/comments/sr-nyse-2023-09/srnyse202309.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 98879 (Nov. 7, 2023), 88 FR 78075 (Nov. 14, 2023). The Commission designated January 2, 2024, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See,* NAC Proposal, *supra* note 3, for a complete description of the proposal as originally filed.

[8] *See,* NAC Proposal, *supra* note 3 at 68811–18.

[9] The Exchange states that for purposes of its proposal, the term ''ecosystem'' refers to specific entities (structures, functions, and components of the natural world) that produce ecosystem services. The Exchange also states that these and other benefits derived from ecosystems are called ecosystem services, and in aggregate, economists estimate their value at more than US$100 trillion dollars per year, and that examples of ecosystem services include clean air, water supply, flood protection, productive soils for agriculture, climate stability, and habitat for wildlife, among others. *See id.*

proposed, a NAC would be permitted to use its funds for activities that support local community well-being, provided that such activities are sustainable. The Exchange states this is in order to align the interests of local communities with the objectives of maximizing the value of natural assets and the production of ecosystem services.

The Exchange proposes to require NACs to publish on a periodic basis information on the ecological performance of the natural assets licensed to a NAC because of the distinct purpose of an NAC to protect and grow the natural assets under its management. This information would be presented in an Ecological Performance Report (an ''EPR''). As proposed, the EPR would provide statistical information on the biophysical measures such as tons of carbon or acre feet of water produced, condition, and economic value of each of the ecosystem services produced by the natural assets managed by the NAC. This, the Exchange states, will allow investors to gauge the effectiveness of management. The Exchange further states that this information would be consistently produced and periodically reported, following best practices from accepted valuation methodologies, as outlined in the Reporting Framework. The Exchange proposes that the EPR produced by a NAC must follow IEG's Ecological Performance Reporting Framework (the ''Reporting Framework''). The Exchange states that the Reporting Framework is based on the natural capital accounting standards established in the United Nations System of Environmental-Economic Accounting—Ecosystem Accounting Framework (''SEEA EA''),[10] and that the proposed EPR would measure, value, and report on the ecosystem services and natural assets managed by a NAC.

Under the proposed amendments to the Manual, NACs will conduct a Technical Ecological Performance Study (''Technical EP Study'') annually, following the Reporting Framework. This Technical EP Study would generate the information used to prepare and publish the EPR. As proposed, the EPR and Technical EP Study must be examined and attested to by a public accounting firm that is registered with the Public Company Accounting Oversight Board (''PCAOB'') and is independent from the NAC and NAC licensor, if applicable, under the independence standard set forth in Rule 2–01 of Regulation S–X (''Independent Reviewer'').

The Exchange states that, in addition to the GAAP financial statements required under Commission disclosure rules and the proposed EPR that would be derived from a Technical EP Study, it proposes to require NACs to provide website disclosures that it states are designed to provide transparency regarding the NAC's social and environmental objectives. These would include requiring NACs to adopt and publish an Environmental and Social Policy, a Biodiversity Policy, a Human Rights Policy, consistent with the United Nations Guiding Principles on Business and Human Rights,[11] and an Equitable Benefit Sharing Policy. The Exchange states that, as proposed, a NAC would be required under applicable Commission rules to disclose all material information about its license with a natural asset owner (including any material amendments to the license over time) in the registration statement filed in connection with its IPO and in its subsequent periodic SEC filings.

Relationship Between the NYSE and IEG

The Exchange states that the Exchange and IEG have entered into an agreement pursuant to which IEG has granted the Exchange an exclusive license in the United States to use the Reporting Framework in connection with the listing of NACs on the Exchange, although the Reporting Framework will remain proprietary to IEG. The Exchange further states that, under the terms of the agreement, the Exchange has acquired a small minority interest in IEG and one seat on IEG's board of directors. The Exchange also states that IEG has agreed to seek to identify and develop NACs for listing on the Exchange, in addition to marketing the listing and trading of NACs on the Exchange. In addition, the Exchange states that IEG would provide training with respect to the NAC structure and the Reporting Framework to NYSE personnel and currently listed and potential listed NACs. IEG would also be entitled to a share of the revenues generated by the Exchange from the listing and trading of NACs on the NYSE.

The Exchange states that, while IEG would seek to promote the listing of NACs on the NYSE, the determination of the suitability for listing of any applicant NACs would solely be made by the staff of NYSE Regulation, and that IEG would have no role in the listing qualification process. The Exchange also states that, in evaluating a NAC for listing, the staff of NYSE Regulation intends to follow the same procedure it utilizes in qualifying operating companies. The Exchange states that NYSE Regulation staff would review disclosures contained in a NAC's registration statement and its audited financial statements to ensure that the NAC satisfies applicable quantitative, qualitative and corporate governance listing standards. In addition, the Exchange states that, on a continued listing basis, NYSE Regulation staff would review a NAC's periodic reports filed with the Commission as well as public disclosure to ensure that a NAC continues to meet applicable listing standards.

Definitions of Key Terms Used in the Proposal

The Exchange states that, unless otherwise stated, the proposed rules use definitions in the SEEA EA.[12] In addition, the Exchange states that the proposal includes terms unique to NACs, as defined below:

Community Well-being—Refers to the combination of social, economic, environmental, cultural, and political conditions of individuals and their communities as essential for them to flourish and fulfil their potential.[13]

Ecological Performance—The value of natural assets and the production of ecosystem services.

Ecological Performance Report—A report with statistical information on the ecological performance of a NAC, including sections with data on (i) Natural Production, (ii) Natural Assets, and (iii) Underlying Asset Condition. The Exchange states that the EPR is unique to NACs and will be provided in addition to traditional financial statements.

- Natural Production Section—A section of the EPR that provides information on the annual flows of ecosystem services managed by a NAC.
- Natural Assets Section—A section of the EPR that provides information on the net present value of natural assets

[10] United Nations et al (2021). *System of Environmental-Economic Accounting—Ecosystem Accounting. White cover publication, pre-edited text subject to official editing.* Available at: *https://seea.un.org/ecosystem-accounting. See,* NAC Proposal, *supra* note 3.

[11] United Nations (2011). *Guiding principles on business and human rights: Implementing the United Nations ''Protect, Respect and Remedy'' framework.* Available at: *https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf. See*, NAC Proposal, *supra* note 3.

[12] United Nations et al (2021). *System of Environmental-Economic Accounting—Ecosystem Accounting (SEEA EA). White cover publication, pre-edited text subject to official editing.* Available at: *https://seea.un.org/ecosystem-accounting. See,* NAC Proposal, *supra* note 3.

[13] Wiseman, J., Brasher, K (2008) *Community wellbeing in an unwell world: trends, challenges, and possibilities.* Journal of Public Health Policy, 29: 353–366. *See,* NAC Proposal, *supra* note 3.

producing ecosystem services managed by a NAC.

• Underlying Asset Condition Section—A section of the EPR that provides biophysical information on the extent and condition of the ecosystems being managed by the NAC.

Ecological Performance Rights—The rights to the value of natural assets and the production or ecosystem services in a designated area, including the authority to manage the area. These rights are granted to a NAC, from a natural asset owner, as provided through a license agreement.

Ecosystem Service Valuation—The assignation of an economic value to an ecosystem service using one of many valuation methodologies accepted today.

IEG Ecological Performance Reporting Framework—IEG has developed a specific framework for NACs to derive and report on ecosystem service values and on the quality of the natural assets being managed. In addition, the Reporting Framework defines the components and structure of the EPR to ensure the values are reported transparently and consistently.

Independent Reviewer—A public accounting firm registered with the PCAOB independent of a NAC and, where applicable, a NAC's licensor.

Local Communities—refers to groups of people—including indigenous peoples and other local groups—who have direct ties to and derive livelihood or cultural values from the area to which the NAC holds the license.

Natural Assets—A statistical representation of ecosystems for accounting purposes that defines them as productive units of ecosystem services. The term ''Natural Assets'' is equivalent to SEEA EA's term ''ecosystem assets.'' Natural assets can be monetized directly or indirectly. Like traditional assets, they have economic value and are expected to provide future streams of benefits. In the singular form, the term refers to an ecosystem type (*e.g.,* a delineated forest).

Natural Asset Companies (NACs)—Corporations that hold the rights to the ecological performance of a defined area and have the authority to manage the areas for conservation, restoration, or sustainable management.

Sustainable Activities—From an ecological perspective, activities that do not cause any material adverse impact on the condition of ecosystems, and that seek to replenish the natural resources being used.

Unsustainable Activities—From an ecological perspective, activities that cause material adverse impact on the condition of ecosystems, and extract resources without replenishing them.

The IEG Reporting Framework

The Exchange states that IEG has developed a Reporting Framework for NACs to measure and value natural assets and define how the EPR should be structured to ensure transparency, robustness, and consistency in the reporting of values and other statistical information disclosed. The Exchange further states that the Reporting Framework to be used by NACs is based on the standards developed in SEEA EA. The Exchange states that the SEEA EA provides the most comprehensive guidance on natural capital accounting and that it is of particular relevance to the valuation of NACs due to its spatial approach and its focus on measuring and reporting on the ecosystem services produced by ecosystems. The Exchange states that IEG adopted SEEA EA as the accounting standard for the measurement and valuation of natural assets and ecosystem services, with some minor adaptations to ensure that the natural asset valuations of NACs provide comprehensive, understandable, consistent, robust, and transparent information to investors and other users of the companies' EPR. As proposed, the Reporting Framework would include specifications on how to apply SEEA EA to report on the annual performance of NACs. The Reporting Framework would set up NACs to report the Total Economic Value (''TEV'') of natural assets, which the Exchange states is in line with the recommendations of the British Standard for natural capital accounting (BS 8632) for financial organizations and the ISO Standard 14008.

The Exchange states that, given that NACs are designed to manage and grow the value of natural assets and the production of ecosystem services, a NAC's activities are not well captured solely by traditional financial reporting standards like GAAP/IFRS, as most ecosystem services are not monetized today. The Exchange further states that, to account for and capture the value of these non-monetized ecosystem services, NACs will be required to conduct an annual Technical EP Study, adhering to IEG's Reporting Framework in order to prepare their EPR. As proposed, the Reporting Framework would define: the steps to characterize, measure and value the ecosystem service and natural asset values in a Technical EP Study, and the components and structure of the EPR, including guidance to compile its sections to ensure transparency, robustness, and consistency in the reporting of information about the natural assets.

As proposed, the Reporting Framework would be publicly accessible on nyse.com. The Exchange states that, in consultation with IEG, the Exchange would have sole authority to determine whether and how to propose amendments to the Reporting Framework. Any proposed change to the Reporting Framework would have the effect of a change to an Exchange rule and would therefore be filed by the Exchange with the Commission pursuant to section 19(b) of the Act. Additionally, the Exchange states that it would maintain on nyse.com a publicly accessible copy of the Reporting Framework.

Proposed Listing Rules: Required Corporate Documents

Charter

The Exchange proposes that each NAC would be required to file its charter as an exhibit to its registration statement. As a condition to initial listing, the NYSE proposes to require a NAC's charter to state the following:

• The purpose of the company is to actively manage, maintain, restore (as applicable), and grow the value of natural assets and their production of ecosystem services. In addition, where doing so is consistent with the company's primary purpose, the company will seek to conduct sustainable revenue-generating operations. Sustainable operations are those activities that do not cause any material adverse impact on the condition of the natural assets under its control, and that seek to replenish the natural resources being used. The sustainability of the revenue-generating operations will be determined based on the impacts of their activities on the condition metrics, and where applicable, on any capacity-to-produce indicators reported by a NAC in its EPR. Condition metrics should not show degradation as a result of these activities and capacity-to-produce indicators should be moving to a rate where resource extraction is less than resource replenishment. The NAC may also engage in other activities that support community well-being, provided such activities are sustainable.

• NAC funds (including any proceeds from the sale of the company's securities at any time) must be used primarily to meet the NAC's operational needs to fulfill its purpose. In addition, funds may be used to support community well-being, provided such activities are sustainable.

• The NAC will be prohibited from engaging directly or indirectly in unsustainable activities. These are defined as activities that cause any material adverse impact on the condition of the natural assets under its control, and that extract resources without replenishing them (including, but not limited to, traditional fossil fuel development, mining, unsustainable logging, or perpetuating industrial agriculture). The NAC will be prohibited from using its funds to finance such unsustainable activities.

As proposed, if any of the foregoing provisions of the NAC's charter are eliminated or materially amended in a manner that is inconsistent with their required form at any time, the NAC would be subject to delisting from the NYSE.

License Agreements

The Exchange states that NACs would acquire the ecological performance rights of a designated area by entering into an agreement with the natural asset owner (*e.g.,* a governmental entity or private landowner) to obtain a license with respect to such rights.[14] The Exchange proposes that all material terms of the applicable license agreement must be publicly disclosed in the NAC's periodic filings consistent with SEC rules. As proposed, at minimum, the NAC would be required to disclose the following information about any license agreement:

• *Term:* At the time of initial listing, the term of any license agreement must be a minimum of ten years from the date of closing of the NAC's initial public offering (the Exchange expects that most license agreements will have terms significantly longer than ten years and, in some cases, may be perpetual);

• *Scope:* The specific natural assets and ecosystem services covered by the license agreement;

• *License Payments:* The amount and terms of any ongoing payments due from the licensee to the licensor;

• *Modification Provisions:* The circumstances under which a license agreement may be modified and the procedures for effecting any such modification;

• *Termination Provisions:* The circumstances under which a license agreement may be terminated, including the rights and obligations of all parties to the license agreement, and the procedures for effecting any such termination.

The proposal would specify that any NAC whose license is terminated or materially breached by either party would be subject to delisting.

NAC Policies

Proposed Section 102.09 of the Manual would provide that a NAC seeking to list on the NYSE must adopt the following written policies (collectively, the ''NAC Policies'') and post them on its website by the earlier of the date that the NAC's initial public offering closes or five business days following the NAC's initial listing date:

• An Environmental and Social Policy that articulates the objectives and principles that will guide the NAC to achieve sound environmental and social performance. As proposed, such policy must include requirements to conduct a process of environmental and social assessment, and establish, as soon as practicable after listing, an Environmental and Social Management System (''ESMS'').[15] The ESMS should be designed to:

• Identify and assess environmental and social risks and impacts,

• Identify measures to avoid, minimize and mitigate the negative risks and impacts, and

• Promote improved environmental and social performance.

• A Biodiversity Policy that articulates a commitment to achieving no net loss, and where possible a net positive impact on biodiversity. The Biodiversity Policy should be based on the mitigation hierarchy, a planning and management approach for addressing impacts to biodiversity and ecosystem services through avoidance, minimization, restoration, and offsetting.

• A Human Rights Policy that articulates a commitment to human rights, consistent with the United Nations Guiding Principles on Business and Human Rights,[16] including a commitment to recognize and respect people's rights in accordance with customary, national, and international human rights laws, in particular those of indigenous peoples.

• An Equitable Benefit Sharing Policy that articulates the NAC's commitment for sharing benefits with local communities. A NAC must include in its license agreement with the licensor a provision requiring the licensor to comply with the applicable terms of the Equitable Benefit Sharing Policy.

The Exchange proposes that Equitable Benefit Sharing Policy must require an equitable benefit sharing arrangement for the distribution of shares of the NAC's common stock to local communities, which the Exchange states would be those who have direct ties to and derive livelihood or cultural values from the applicable area. As proposed, the NAC's common stock distribution would be required to be completed no later than the time of closing of the NAC's IPO and meet the following requirements at a minimum:

• If the NAC has entered into a license agreement with respect to public lands, shares representing at least 50% of the shares of the NAC's outstanding shares as of the closing of the IPO must be distributed to local communities.

• If the NAC has entered into a license agreement with respect to private lands, shares representing at least 5% of the shares of the NAC outstanding as of the closing of the IPO must be distributed to local communities.

Under the proposed changes to the Manual, the foregoing distributions of shares of common stock may be placed in a trust or equivalent structure, for the benefit of the intended beneficiaries. Any trust (or equivalent) holding shares of the NAC for this purpose must be under the majority control of trustees that are fully independent of both the NAC and, where applicable, the licensor, and/or be representative of the intended beneficiaries.

As proposed, the Equitable Benefit Sharing Policy must provide that the NAC will (a) deposit its cash and other financial assets in accounts with a bank custodian regulated by the U.S. Office of the Comptroller of the Currency (an ''Authorized Bank''); and (b) include in its license agreement a provision requiring the licensor to place any shares of the NAC it owns in the custody of an Authorized Bank and deposit the proceeds from any NAC share sales by the licensor and any distributions received from the NAC in accounts with an Authorized Bank, pending the distribution of such assets in a manner consistent with the NAC's Equitable Benefit Sharing Policy.

Under the proposed rule change, the NAC would be required to review the

[14] The Exchange states that it will be important for NACs in their offering materials and subsequent public disclosure documents to be clear in distinguishing the rights to the land ownership and geographic area from the rights to the ecological performance and to clearly specify, where appropriate, the limits of the NAC's rights as an owner or licensee. *See, NAC Proposal, supra note 3.*

[15] The Exchange states that the ESMS should be consistent with generally accepted international standards, such as the ''IFC Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts.'' *See,* NAC Proposal, *supra* note 3.

[16] United Nations (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations ''Protect, Respect and Remedy'' Framework.* Available at: *https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf. See, NAC Proposal, supra note 3.*

adequacy of the Equitable Benefit Sharing Policy at least annually and publish on its website a detailed description of its activities in accordance with such policy (the ''Annual EBS Report'') no later than 90 days after the end of each fiscal year.

As proposed, the Annual EBS Report would be required to be examined by an Independent Reviewer (the ''EBS Independent Reviewer'') and be accompanied by an examination level report (*i.e.,* reasonable assurance) regarding the NAC and, if applicable, the licensor, in accordance with the Equitable Benefits Sharing Policy during the applicable fiscal period, including a review of the accounts maintained by the NAC and the licensor at Authorized Banks, in accordance with the PCAOB or AICPA's attestation standards.

As proposed, the NAC's accordance with the requirements of its Equitable Benefits Sharing Policy would be required to be reviewed periodically either by (i) a committee consisting solely of directors who meet the independence requirements of Section 303A of the Manual or (ii) the NAC's independent directors acting as a group. Such committee or the independent directors, as the case may be, must meet for this purpose at least annually and such meeting must include an executive session in which management does not participate and a discussion with the EBS Independent Reviewer at which management must not be present.

Ecological Performance Report

Proposed Section 102.09 would provide that, prior to its initial listing, the NAC must make publicly available an EPR that has been prepared consistent with the Reporting Framework. The Reporting Framework (including instructions for the preparation of the EPR and templates for the EPR) would be posted on nyse.com. As proposed, NACs would conduct a Technical EP Study annually in accordance with Reporting Framework. The Technical EP Study would generate the information used to prepare and publish the EPR. Both the Technical EP Study and EPR would be required to be examined by an Independent Reviewer annually. The EPR would also be required to be accompanied by an examination level report (*i.e.,* reasonable assurance) prepared by such Independent Reviewer in accordance with the PCAOB or AICPA's attestation standards.

Quantitative and Corporate Governance Listing Rules

To qualify for listing as a NAC, an applicant issuer would be required to meet the quantitative listing requirements applicable to the listing of common equities of operating companies as set forth in Sections 102.01(A), (B), and (C) of the Manual. Proposed Section 102.09(G) would provide that listed NACs would be subject to all of the continued listing requirements that are applicable to operating companies listed under Sections 102 and 103 of the Manual.

Audit Committee

The Exchange proposes that a listed NAC would be subject to all of the corporate governance requirements set forth in Section 303A.00, including the requirement of Section 303A.06 (providing that a company must have an independent audit committee) and the provisions of Section 303A.07 (setting forth additional requirements for the audit committee). The Exchange proposes to amend Section 303A.07 to establish additional responsibilities specific to the audit committee of a NAC. As proposed, Section 303A.07 would require that (in addition to the requirements of Section 303A.07(b)), the NAC's audit committee charter must address the following:

- That the audit committee's purpose includes assisting board oversight of (1) the integrity of the NAC's EPR, (2) the qualifications and independence of the Independent Reviewer and (3) the performance of the Independent Reviewer.
- The audit committee of the NAC must:
- at least annually, obtain and review a report by the Independent Reviewer describing: the Independent Reviewer's internal quality-control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the Independent Reviewer, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the Independent Reviewer, and any steps taken to deal with any such issues; and (to assess the Independent Reviewer's independence) all relationships between the Independent Reviewer and the NAC. After reviewing the foregoing report and the Independent Reviewer's work throughout the year, the audit committee would be in a position to evaluate the Independent Reviewer's qualifications, performance, and independence. This evaluation should include the review and evaluation of the lead partner of the Independent Reviewer. In making its evaluation, the audit committee should take into account the opinions of management and the NAC's internal auditors (or other personnel responsible for the internal audit function). In addition to assuring the regular rotation of the lead partner responsible for the EPR Review, the audit committee should further consider whether, in order to assure continuing independence of the Independent Reviewer, there should be regular rotation of the firm undertaking the EPR Review itself. The audit committee should present its conclusions with respect to the Independent Reviewer to the full board and meet to review and discuss the NAC's annual EPR. Meetings may be telephonic if permitted under applicable corporate law; polling of audit committee members, however, is not permitted in lieu of meetings.
- meet separately, periodically, with management and the Independent Reviewer to discuss the EPR and the conduct of the EPR Review. To perform its oversight functions most effectively, the audit committee must have the benefit of separate sessions with management and the Independent Reviewer. These separate sessions may be more productive than joint sessions in surfacing issues warranting committee attention.
- review with the Independent Reviewer any problems in the conduct of their review or difficulties and management's response. The audit committee must regularly review with the Independent Reviewer any difficulties the Independent Reviewer encountered in the course of its review, including any restrictions on the scope of the Independent Reviewer's activities or on access to requested information, and any significant disagreements with management.
- set clear hiring policies for employees or former employees of the Independent Reviewer. Employees or former employees of the Independent Reviewer may be valuable additions to the NAC's management. Such individuals' familiarity with the business, and personal rapport with the employees, may be attractive qualities when filling a key opening. However, the audit committee should set hiring policies taking into account the pressures that may exist for personnel of the Independent Reviewer consciously or subconsciously seeking a job with the NAC they review.
- report regularly to the board of directors with respect to the preparation of the EPR and the performance of the Independent Reviewer. The audit committee should review with the full board any issues that arise with respect to the quality or integrity of the EPR or

the performance and independence of the Independent Reviewer.

Material News

The Exchange proposes that a NAC would be required to immediately disclose, pursuant to the Exchange's immediate release policy set forth in Sections 202.05 and 202.06 of the Manual, any event (*e.g.,* a forest fire) that is anticipated to have a material adverse effect with respect to any of the criteria included in the EPR. As soon thereafter as possible, the NAC would be required to disclose in a Form 8–K or Form 6–K, as applicable, its estimates of the changes to the previously presented EPR of such event.

Periodic Publication of EPR and Occurrence of a Late EPR Delinquency

The Exchange proposes that, each year after initial listing, a NAC must publish on its public website an EPR that has been prepared consistent with the Reporting Framework. As proposed, the Technical EP Study and EPR must be examined by the Independent Reviewer. The EPR would be required to be accompanied by an examination level report prepared by such Independent Reviewer in accordance with the PCAOB or AICPA's attestation standards. The EPR would be required to cover the same fiscal periods as the audited financial statements included in the NAC's annual report on Form 10–K, Form 20–F, or Form 40–F, as applicable. As proposed, the NAC would be required to use its best efforts to publish its annual EPR no later than the filing of its annual report on Form 10–K, Form 20–F, or Form 40–F, as applicable. In the event that the annual EPR is not completed by the filing due date of the NAC's annual report on Form 10–K, Form 20–F, or Form 40–F, as applicable, such annual EPR is required to be published no later than 180 days after the end of the fiscal year to which such annual EPR relates (the ''NAC EPR Due Date'' and the failure of a listed NAC to timely publish its annual EPR, a ''NAC Late EPR Delinquency''). As proposed, in the event that the company is unable to file its Form 10–K, Form 20–F, or Form 40–F, as applicable, by the NAC EPR Due Date, the company should not delay the publication of its EPR, but rather should publish its EPR on or before that date.

The Exchange proposes that upon the occurrence of a NAC Late EPR Delinquency, the Exchange will promptly send written notification (the ''NAC Late EPR Delinquency Notification'') to an affected NAC of the procedures set forth below. As proposed, within five days of the date of the NAC Late EPR Delinquency Notification, the company will be required to (a) contact the Exchange to discuss the status of the delinquent annual EPR (the ''Delinquent NAC EPR'') and (b) issue a press release disclosing the occurrence of the NAC Late EPR Delinquency, the reason for the NAC Late EPR Delinquency, and, if known, the anticipated date such NAC Late EPR Delinquency will be cured via the publication of the Delinquent NAC EPR. If the company has not issued the required press release within five days of the date of the NAC Late EPR Delinquency Notification, the Exchange would issue a press release stating that the company has incurred a NAC Late EPR Delinquency and providing a description thereof.

NAC Non-Reliance Event

The Exchange proposes that, in the event that a NAC concludes that its previously issued EPR should no longer be relied upon because of an error in such EPR (a ''NAC Non-Reliance Event,'' and the disclosure of such NAC Non-Reliance Event, a ''NAC Non-Reliance Disclosure''), the NAC would be required to comply with the NAC Late EPR Delinquency Notification procedures set forth above. As proposed, if the NAC does not publish an amended EPR within 60 days of the issuance of the NAC Non-Reliance Disclosure (an ''Extended NAC Non-Reliance Disclosure Event'' and, together with a NAC Late EPR Delinquency, a ''NAC Reporting Delinquency'') for purposes of the cure periods described below a NAC Reporting Delinquency would be deemed to have occurred on the date of original issuance of the NAC Non-Reliance Disclosure. If the Exchange believes that a NAC is unlikely to publish the amended EPR within 60 days after a NAC Non-Reliance Disclosure or that the errors giving rise to such NAC Non-Reliance Disclosure are particularly severe in nature, the Exchange may, in its sole discretion, determine earlier than 60 days that the applicable NAC has incurred a NAC Publication Delinquency as a result of such NAC Non-Reliance Disclosure.

Cure Periods for NAC Publication Delinquencies

The Exchange proposes that, during the six-month period from the date of the NAC Publication Delinquency (the ''Initial NAC EPR Cure Period''), the Exchange will monitor the company and the status of the Delinquent NAC EPR, including through contact with the company, until the NAC Publication Delinquency is cured. If the company fails to cure the NAC Publication Delinquency within the Initial NAC EPR Cure Period, the Exchange may, in the Exchange's sole discretion, allow the company's securities to be traded for up to an additional six-month period (the ''Additional NAC EPR Cure Period'') depending on the company's specific circumstances. If the Exchange determines that an Additional NAC EPR Cure Period is not appropriate, suspension and delisting procedures will commence in accordance with the procedures set out in Section 804.00 of the Listed Company Manual. As proposed, a NAC will not be eligible to follow the procedures outlined in Sections 802.02 and 802.03 with respect to these criteria.

The Exchange proposes that, in determining whether an Additional NAC EPR Cure Period after the expiration of the Initial NAC EPR Cure Period is appropriate, the Exchange will consider the likelihood that the Delinquent NAC EPR can be published during the Additional NAC EPR Cure Period. The Exchange states that it strongly encourages companies to provide ongoing disclosure on the status of the Delinquent NAC EPR to the market through press releases and will also take the frequency and detail of such information into account in determining whether an Additional NAC EPR Cure Period is appropriate. As proposed, if the Exchange determines that an Additional NAC EPR Cure Period is appropriate, and the company fails to publish the Delinquent NAC EPR by the end of such Additional NAC EPR Cure Period, suspension and delisting procedures will commence immediately in accordance with the procedures set out in Section 804.00. In no event would the Exchange continue to trade a NAC's securities if that company has failed to cure its NAC EPR Delinquency on the date that is twelve months after the applicable NAC EPR Due Date.

Filing Delinquencies and NAC EPR Delinquencies Are Treated Separately

The Exchange proposes that, for purposes of Section 802.01E, NACs would also be subject to the provisions with respect to delinquencies in filing periodic reports as set forth in that rule (a ''Filing Delinquency''). The Exchange states that a Filing Delinquency is a separate event of noncompliance from a NAC Publication Delinquency. Consequently, and as proposed, a NAC could be deemed to have cured a Filing Delinquency while remaining noncompliant due to an ongoing NAC Publication Delinquency or vice versa.

Components and Form of the Statements

The Exchange proposes that the EPR published by NYSE-listed NACs will consists of three components: (1) Natural Production Section, (2) Natural Assets Section and (3) Underlying Asset Condition Section.

As proposed, the process for conducting a Technical EP Study and the requirements for preparing an EPR would be contained in the Reporting Framework. NACs would be required to conduct a Technical EP Study and prepare and publish an EPR that complies with the Reporting Framework, in each case on an annual basis.

B. Exchange Arguments

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[17] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange states that the proposed listing standard for NACs is consistent with the protection of investors and the public interest because, among other things, it includes rigorous quantitative financial requirements and corporate governance requirements. Specifically, the Exchange states that the proposed listing standard requires NACs to meet the same quantitative initial and continued listing standards as are applied to operating companies listed on the NYSE and would be subject, without exception, to all of the other rules applicable to NYSE listed operating companies. The Exchange notes that there is significant and growing interest in investing in asset classes that are consistent with the objective of protecting and improving the environment and believes that the listing of NACs will provide investors with an investment vehicle that meets this demand. The Exchange also states that the development of NACs will provide a source of funding to maintain and restore natural assets.

The Exchange states that the charter provisions each NAC would be required to adopt under the proposed rule are also consistent with the protection of investors and the public interest because they are designed to ensure that the NAC conducts its operations in a manner consistent with the ecological and socially equitable goals that would motivate investors when investing in the NAC. Similarly, the Exchange states, the various policies that the NAC would be required to adopt and publicize (including an Environmental and Social Policy, a Biodiversity Policy, a Human Rights Policy, and an Equitable Benefits Sharing Policy) would protect investors by establishing clear standards that the NAC must abide by in seeking to address its stated ecological and social goals.

In addition, the Exchange believes that the examination conducted by the Independent Reviewer with respect to the initial and periodic EPR published by each NAC are consistent with investor protection and the public interest because they are designed to ensure that such EPR is prepared in a manner that is consistent with the requirements of the Reporting Framework. The Exchange further states that, this examination of each NAC's EPR will protect investors by providing significant assurance as to the reliability of that EPR. The proposal would also amend Section 802.01E of the Manual to create non-compliance and delisting procedures for NACs that fail to timely publish their EPR. The Exchange further argues that the proposed requirements for the audit committee of the NAC to oversee the preparation of the EPR and the performance of the Independent Reviewer are consistent with the protection of investors as they will help assure the accuracy and completeness of the EPR and the quality of the Independent Reviewer's review. The Exchange also notes that, as is the case with all listed companies, NACs would be required to immediately disclose pursuant to the Exchange's immediate release policy set forth in Sections 202.05 and 202.06 of the Manual any material event, including any event that is anticipated to have a material adverse effect with respect to any of the criteria included in the EPR (*e.g.,* a forest fire). The Exchange believes that it is therefore in the interests of investors to have a rigorous rule to address delinquencies with respect to disclosures and to require immediate disclosure of material events.

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because a listing under the proposed rule would be available in a non-discriminatory way to any company satisfying its requirements, as well as all other applicable NYSE listing requirements. In addition, the Exchange believes it faces competition for listings and any competing exchange could similarly adopt rules to allow the listing of NACs.

C. Comment Letters Received on the Proposal

The Commission has received comment letters that support the proposal, comment letters that suggest changes to the proposal, and comment letters that oppose the proposal.

III. Proceedings To Determine Whether To Approve or Disapprove SR–NYSE–2023–09 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to section 19(b)(2)(B) of the Act [18] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to section 19(b)(2)(B) of the Act,[19] the Commission is providing notice of the grounds for disapproval under consideration. As described above, The Exchange proposes to adopt a new subsection of Section 102 of the Manual (to be designated Section 102.09) to permit the listing of common equity securities of NACs. As stated above, the Commission has received comment letters that support the proposal, comment letters that suggest changes to the proposal, and comment letters that oppose the proposal.

The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposal with section 6(b)(5) of the Act,[20] which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78s(b)(2)(B).

[19] *Id.*

[20] 15 U.S.C. 78f(b)(5).

impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the exchange; and section 6(b)(8) of the Act,[21] which requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [22] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[23]

The Commission requests comment on all aspects of the proposal, and its consistency with applicable statutory requirements, including those discussed above. Based broadly on concerns raised by commenters the Commission also requests comment regarding, but not limited to, the following:

- the use of the Reporting Framework and its relationship to the UN SEEA EA model, British Standard recommendations, and other sources referenced for the underlying EPR data;
- the relationship between NYSE and IEG in general, including but not limited to the responsibilities of each under the proposal; how modifications of the Reporting Framework would be addressed; issues regarding independence, oversight, and potential conflicts of interest as between the entities and as among the audit committee or any auditors, experts, or advisory entities under the proposal; and the availability of books and records;
- the licensing arrangement for NACs as proposed and the sufficiency of the proposal regarding such licensing or other legal arrangements that a NAC would be permitted to enter into;
- the impact of the proposal on intermarket competition, including the exclusive agreement between IEG and NYSE;
- whether the proposed additional listing requirements for NACs and their implementation and application, including use of terminology, applicable thresholds, use of funds, and substantive obligations, are described with sufficient detail and clarity so as to provide investors with the information necessary to understand the relationship between such additional NAC requirements and the NAC's GAAP financials;
- the proposed use of the financial statements and metrics in the EPR as compared to a NAC's GAAP financial statements;
- as related to the Commission's non-GAAP rules, the proposed use of GAAP terms and concepts in connection with the Reporting Framework, EPR, the Technical EP Study, and other related NAC materials, and the extent, if any, to which the relationship between a NAC's GAAP financial statements and reporting requirements and the EPR and related materials could potentially result in overlap or double counting, confusion, or lack of clarity, as well as the application of the materiality standard; and,
- the suitability, clarity, and level of guidance of criteria for the Reporting Framework and other NAC materials, and implementation of the same, as well as the other requirements applicable to NACs, for audit purposes and attestation, including the scope of any attestation engagement and the roles of the relevant parties; and,
- the ability of a NAC to list on the Exchange pursuant to either an initial public offering or a direct listing.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with sections 6(b)(5) [24] and 6(b)(8) [25] of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,[26] any request for an opportunity to make an oral presentation.[27]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by January 18, 2024. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by February 1, 2024.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSE–2023–09 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSE–2023–09. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public

[21] 15 U.S.C. 78f(b)(8).

[22] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[23] *See id.*

[24] 15 U.S.C. 78f(b)(5).

[25] 15 U.S.C. 78f(b)(8).

[26] 17 CFR 240.19b–4.

[27] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection.

All submissions should refer to file number SR–NYSE–2023–09 and should be submitted on or before January 18, 2024. Rebuttal comments should be submitted by February 1, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28611 Filed 12–27–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35080; File No. 812–15513]

MainStay MacKay Municipal Income Opportunities Fund and New York Life Investment Management LLC

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 18(a)(2), 18(c) and 18(i) of the Act, under sections 6(c) and 23(c) of the Act for an exemption from rule 23c–3 under the Act, and for an order pursuant to section 17(d) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain registered closed-end investment companies to issue multiple classes of shares and to impose asset-based distribution and/or service fees and early withdrawal charges.

APPLICANTS: MainStay MacKay Municipal Income Opportunities Fund and New York Life Investment Management LLC.

FILING DATES: The application was filed on October 11, 2023, and amended on December 14, 2023.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on January 16, 2024, and should be accompanied by proof of service on the Applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: J. Kevin Gao, Esq., New York Life Investment Management LLC, 51 Madison Avenue, New York, New York 10010; with a copy to Thomas C. Bogle, Esq., and Corey F. Rose, Esq., 1900 K. Street NW, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Trace W. Rakestraw, Senior Special Counsel, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' application, dated December 14, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field on the SEC's EDGAR system.

The SEC's EDGAR system may be searched at *https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Dated: December 22, 2023.

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28671 Filed 12–27–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99226; File No. SR–MSRB–2023–07]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change To Amend MSRB Rule G–12 To Promote the Completion of Allocations, Confirmations, and Affirmations by the End of Trade Date

December 21, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 20, 2023, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change to amend MSRB Rule G–12 (''Rule G–12''), on uniform practice, to promote the completion of allocations, confirmations, and affirmations by the end of trade date for municipal securities transactions between brokers, dealers and municipal securities dealers and their institutional customers to facilitate the move to a settlement cycle of one business day (the ''proposed rule change'').

The MSRB requests that the proposed rule change be approved with a compliance date of May 28, 2024, to align with the compliance date for amended Exchange Act Rule 15c6–1 and new Exchange Act Rule 15c6–2, as described herein.[3]

The text of the proposed rule change is available on the MSRB's website at *https://msrb.org/2023-SEC-Filings,* at the MSRB's principal office, and at the Commission's Public Reference Room.

[28] 17 CFR 200.30–3(a)(57).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 96930 (Feb. 15, 2023), 88 FR 13872 at 13918 (Mar. 6, 2023) (File No. S7–05–22) (the ''Commission T+1 Adopting Release''). If the Commission's compliance date were to change, the MSRB would issue a regulatory notice to modify the compliance date for the proposed rule change to remain aligned with the Commission's revised compliance date.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend Rule G–12 by adding a new section (k) to promote the completion of allocations, confirmations, and affirmations by the end of trade date for transactions in municipal securities between brokers, dealers and municipal securities dealers (''dealers'') and their institutional customers. This proposed rule change would align with the same-day allocation, confirmation, and affirmation process for equities and corporate bonds under Exchange Act Rule 15c6–2, as adopted.[4] Although Exchange Act Rule 15c6–2, as adopted,[5] does not apply to municipal securities transactions, the MSRB believes that the same-day allocation, confirmation, and affirmation process for municipal securities transactions in the secondary market should be consistent with that for equity and corporate bond transactions. This proposal is designed to facilitate the industry's move to a settlement cycle of one business day (''T+1'') as described further below. To align with Exchange Act Rule 15c6–2, as adopted,[6] the MSRB is proposing to amend Rule G–12 by adding a section (k) to require dealers effecting municipal securities transactions subject to the T+1 settlement cycle to either enter into written agreements as specified in the proposed rule change or establish, maintain, and enforce written policies and procedures reasonably designed to address certain objectives related to completing allocations, confirmations, and affirmations as soon as technologically practicable and no later than the end of trade date.

[4] 17 CFR 240.15c6–2.

[5] *Id.*

[6] *Id.*

Background

On February 15, 2023, the Commission adopted amendments to Exchange Act Rule 15c6–1 (''Amended Exchange Act Rule 15c6–1'')[7] to shorten the settlement cycle of most equity and corporate bond transactions from two business days to T+1. In alignment with Amended Exchange Act Rule 15c6–1, the MSRB amended its Rule G–12(b)(ii)(B)–(D) and Rule G–15(b)(ii)(B)–(C) to define regular-way settlement as occurring on the first business day following the trade date rather than on the second business day following the trade date.[8]

In the Commission T+1 Adopting Release, the Commission stated that implementing a T+1 standard settlement cycle would require significant improvements in the current rates of same-day allocations, confirmations, and affirmations to help ensure timely settlement in a T+1 environment.[9] In the Commission T+1 Adopting Release, the Commission proposed new Exchange Act Rule 15c6–2 to establish requirements that facilitate the completion of allocations, confirmations, and affirmations by the end of the trade date, helping to facilitate the settlement of institutional transactions in a T+1 or shorter standard settlement cycle by promoting the timely and orderly transmission of trade data necessary to achieve settlement.[10]

Exchange Act Rule 15c6–2 provides two options by which broker-dealers may comply with the rule, as adopted.[11] The first option under Exchange Act Rule 15c6–2 provides that, where parties have agreed to engage in an allocation, confirmation, or affirmation process, a broker-dealer would be prohibited from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, a government security, a municipal security, commercial paper, bankers' acceptances, or commercial bills) on behalf of a customer unless such broker-dealer has entered into a written agreement with the customer that requires the allocation, confirmation, affirmation, or any combination thereof, to be completed no later than the end of the day on trade date in such form as may be necessary to achieve settlement in compliance with Exchange Act Rule 15c6–1(a).[12]

[7] 17 CFR 240.15c6–1.

[8] *See* Exchange Act Release No. 97585 (May 25, 2023), 88 FR 35961 (June 1, 2023) (File No. SR–MSRB–2023–03).

[9] *See* Commission T+1 Adopting Release, 88 FR at 13890.

[10] *See id.* at 13947.

[11] 17 CFR 240.15c6–2.

[12] 17 CFR 240.15c6–2(a)(1).

The second option under Exchange Act Rule 15c6–2 provides an alternative where, in lieu of a written agreement, a broker-dealer may choose to establish, maintain, and enforce written policies and procedures reasonably designed to ensure the completion of the allocation, confirmation, affirmation, or any combination thereof, for the transaction as soon as technologically practicable and no later than the end of the day on trade date in such form as necessary to achieve settlement of the transaction.[13] Exchange Act Rule 15c6–2 sets out several specific requirements for such written policies and procedures.[14]

Proposal

The proposed amendments to Rule G–12 would add a new section (k) that would establish the core standard of same-day allocation, confirmation and affirmation for all regular-way transactions in municipal securities required to be settled on the first business day following the trade date under Rule G–12(b)(ii)(B) or MSRB Rule G–15(b)(ii)(B). Proposed Rule G–12(k)(i) refers to the terms ''confirmation,'' ''affirmation'' and ''allocation'' as having the same meaning as used in the Securities Exchange Act Rule 15c6–2. For purposes of proposed Rule G–12(k), the terms ''confirmation'' and ''affirmation'' refer to the transmission of messages among dealers, institutional investors, and custodian banks to confirm the terms of a trade executed for an institutional investor, a process necessary to ensure the accuracy of the trade being settled, consistent with how such terms are used in Exchange Act Rule 15c6–2.[15] Additionally, the term ''allocation'' refers to the process by which an institutional investor (often an investment adviser) allocates a large trade among various client accounts or determines how to apportion securities trades ordered contemporaneously on behalf of multiple funds or non-fund clients, consistent with how such term is used in Exchange Act Rule 15c6–2.[16]

Similar to Exchange Act Rule 15c6–2, proposed Rule G–12(k)(ii) would provide two options by which dealers would comply with the rule to meet the

[13] 17 CFR 240.15c6–2(a)(2).

[14] 17 CFR 240.15c6–2(b)(1–5).

[15] *See* Commission T+1 Adopting Release, 88 FR at 13886. The term ''confirmation'' under proposed Rule G–12(k) refers to the operational message that includes trade details provided by the dealer to the customer to verify trade information so that a trade can be prepared for timely settlement. This is in contrast to trade confirmations required under Rule G–12(c) or MSRB Rule G–15(a), which list a series of disclosures that dealers are required to provide in writing to dealers or customers at or before completion of a transaction.

[16] *Id.*

standard of same-day allocation, confirmation and affirmation for all regular-way transactions in municipal securities, also referred to as ''same-day affirmation.'' The first option under the newly added section (k)(ii)(A) to Rule G–12 would allow dealers to enter into a written agreement with the relevant parties to ensure completion of the allocation, confirmation, affirmation, or any combination thereof, for the transaction as soon as technologically practicable and no later than the end of the day on trade date in such form as necessary to achieve settlement of the transaction.

The term ''relevant parties'' should be read more broadly than merely customers and would include, for example, investment advisers, custodians, or other agents to the extent that such parties would participate in the allocation, confirmation, and affirmation process.[17] Similar to Exchange Act Rule 15c6–2, when entering into written agreements, the dealer would need to identify and enter into agreements with only the relevant parties that would have a role in completing the allocation, confirmation and affirmation process.[18] If a dealer is acting in the capacity of an executing broker on behalf of a customer and another dealer is settling the transaction (*i.e.,* as a clearing broker), then the executing broker would only comply with the rule to the extent that it participates in the allocation, confirmation and affirmation process. In such a scenario, the executing broker would ensure that its arrangements with the clearing broker identify that the clearing broker will be the dealer engaging in the allocation, confirmation, and affirmation process for compliance with the proposed rule change. To the extent that there is no such arrangement between the executing broker and the clearing broker, the executing broker should consider whether it needs to establish, implement, and maintain policies and procedures to identify and explain its role and relationship with the clearing broker.[19] An executing broker that does not participate in allocation, confirmation, and affirmation processes would face no obligations under the proposed rule change.[20] A dealer would not be deemed to have violated Rule G–12 as amended by the proposed rule change based on the actions of the counterparty (*e.g.,* if an investment adviser fails to provide allocation information to the dealer as required under the agreement) as long as the written agreement describes the obligations of the parties to ensure the allocation, confirmation, or affirmation of the transaction, and the dealer itself has complied with its obligations under the written agreement.[21]

The MSRB believes that the term ''trade'' and ''end of the day on trade date'' are widely used by the industry and sufficiently understood to facilitate compliance with the proposed rule change.[22] The proposed rule change uses the term ''end of the day on trade date'' rather than requiring a specific time earlier than end of day to allow firms to maximize their internal processes to meet the appropriate cutoff times and other deadlines, as soon as technologically practicable. The MSRB believes that this would allow for the relevant parties to negotiate terms and expectations that are responsive to their specific operational arrangements and in turn facilitate the same-day allocation, confirmation and affirmation to further facilitate the timely settlement of the transaction.[23]

The second option to meet the core standard of same-day allocation, confirmation and affirmation is listed in the proposed amendment to Rule G–12 under the newly added section (k)(ii)(B). Under this option, dealers would be required to establish, maintain, and enforce written policies and procedures reasonably designed to ensure completion of the allocation, confirmation and affirmation for the transaction as soon as technologically practicable and no later than the end of the day on trade date. At a minimum, the policies and procedures required under the proposed new section Rule G–12(k)(ii)(B) must:

(A) Identify and describe any technology systems, operations, and processes that the dealer uses to coordinate with other relevant parties, including investment advisers and custodians, to ensure completion of the allocation, confirmation, or affirmation process for the transaction;

(B) Set target time frames on trade date for completing the allocation, confirmation, and affirmation for the transaction;

(C) Describe the procedures that the dealer will follow to ensure the prompt communication of trade information, investigate any discrepancies in trade information, and adjust trade information to help ensure that the allocation, confirmation, and affirmation can be completed by the target time frames on trade date;

(D) Describe how the dealer plans to identify and address delays if another party, including an investment adviser or a custodian, is not promptly completing the allocation or affirmation for the transaction, or if the dealer experiences delays in promptly completing the confirmation; and

(E) Measure, monitor, and document the rates of allocations, confirmations, and affirmations completed as soon as technologically practicable and no later than the end of the day on trade date.

The policies and procedures alternative in proposed Rule G–12(k)(ii)(B) could help ensure that, when the parties to a transaction encounter obstacles that may prevent them from completing an allocation, confirmation, or affirmation on trade date, they have policies and procedures to navigate, address, and, when possible, mitigate or overcome such obstacles. For example, similar to Exchange Act Rule 15c6–2, reasonably designed policies and procedures generally could include robust compliance and monitoring systems; processes to escalate identified instances of noncompliance for remediation; procedures that designate responsibility to business line personnel for supervision of functions and persons; processes for escalating issues; processes for periodic review and testing of the adequacy and effectiveness of policies and procedures; and training on policies and procedures.[24]

Under proposed Rule G–12(k)(iii)(A), the policies and procedures should be reasonably designed to ensure that the dealer considers holistically the range of systems and tools it has available to facilitate the same-day affirmation objective, as well as the range of operations and processes that a dealer uses to facilitate same-day affirmations across different customer and commercial relationships.[25] Similar to Exchange Act Rule 15c6–2, the MSRB believes that different processes may be necessary to facilitate same-day affirmations because certain transactions or customer types require different arrangements and a dealer may require different arrangements for a customer who engages directly with the dealer versus a customer whose investment adviser or custodian engages with the dealer on its behalf. Further, to be reasonably designed, dealers would need to categorize and assess the range of operational arrangements and

[17] *See id.* at 13892.

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.* at 13891.

[22] *See id.* at 13897.

[23] *See id.*

[24] *See id.* at 13894.

[25] *See id.* at 13895.

processes that would be used to facilitate the same-day affirmation process across the full range of different customer and transaction types for which it offers services.[26]

The MSRB is aware that a dealer may not be able to complete the same-day affirmation process on the trade date with respect to every transaction it executes for every customer in every circumstance. Therefore, proposed Rule G–12(k)(iii)(B) requires that the policies and procedures should set target time frames for the range of transaction and customer types the dealer serves, as well as the range of systems and operational processes it might employ.[27] Similar to the Commission, the MSRB believes that reasonably designed procedures would be able to categorize the range of transactions and customer relationships that a dealer has established and estimate the length of time it takes to complete each of the allocation, confirmation, and affirmation to set its target time frames.[28] A dealer is required to enforce its policies and procedures, meaning that it is obligated to design its systems and commit the necessary resources to ensure that it can comply with its own policies and procedures under the proposed rule change.[29]

Proposed Rule G–12(k)(iii)(C) would require that policies and procedures lay out the ex ante steps that the dealer would take to promptly communicate trade information, as well as to investigate discrepancies and adjust trade information in response to information the dealer receives.[30] Although target time frames will not always be met, and although affirmations will not always be complete on trade date, a dealer is required to enforce its policies and procedures to ensure that an action fully within the dealer's own control is not preventing the completion of the allocation, confirmation, or affirmation for the transaction.[31]

Proposed Rule G–12(k)(iii)(D) would require that policies and procedures describe how the dealer plans to identify and address delays if another party, including an investment adviser or a custodian, is not promptly completing the allocation or affirmation for the transaction, or if the dealer experiences delays in promptly completing the confirmation. In addition, policies and procedures generally should identify the circumstances under which a dealer may experience delays in promptly completing the confirmation and what steps it would take to resolve the delays or any recurring problems.[32]

Finally, proposed Rule G–12(k)(iii)(E) would require that policies and procedures be reasonably designed to measure, monitor, and document the rates of allocations, confirmations, and affirmations completed within the target time frames established under proposed Rule G–12(k)(iii)(B), as well as the rates of allocations, confirmations, and affirmations completed as soon as technologically practicable and no later than the end of trade date.[33] While proposed Rule G–12(k) does not require that same-day affirmation occur for every transaction that a dealer executes and settles, for policies and procedures to be effective, the dealer generally should use the metrics identified by proposed Rule G–12(k)(iii)(E) to assess how well its policies and procedures ensure the completion of same-day affirmation and update its policies and procedures over time with improvements.

Compliance Date

The compliance date of the proposed rule change will correspond with the industry's transition to T+1 settlement consistent with the compliance date for amended Exchange Act Rule 15c6–1[34] and new Exchange Act Rule 15c6–2,[35] which is currently scheduled for May 28, 2024. If the Commission's compliance date were to change, the MSRB would issue a regulatory notice to modify the compliance date of the proposed rule change to remain aligned with the Commission's revised compliance date.[36]

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with section 15B(b)(2) of the Exchange Act,[37] which provides that the MSRB shall propose and adopt rules to effect the purposes of the Exchange Act with respect to transactions in municipal securities effected by dealers and advice provided to or on behalf of municipal entities or obligated persons by dealers and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by dealers and municipal advisors.

Section 15B(b)(2)(C) of the Exchange Act[38] provides that the MSRB's rules shall be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The MSRB believes the proposed rule change is consistent with section 15B(b)(2)(C) of the Exchange Act.[39] The proposed rule change will foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities by applying the same standard for same-day allocation, confirmation and affirmation established by the SEC to transactions in municipal securities. Fostering a consistent standard across asset classes of securities would continue to promote just and equitable principles of trade by facilitating compliance and reducing the risk of regulatory confusion that could result from an obligation to apply different standards for different asset classes of securities.

Further, the proposed rule change would foster cooperation and coordination among regulators by having similar same-day allocation, confirmation and affirmation standards as the Commission. By providing a uniform standard for all types of broker-dealers engaging in equity securities, corporate bonds and/or municipal securities transactions, this alignment of the regulatory scheme will foster greater cooperation and coordination among the MSRB and the Commission and Financial Industry Regulatory Authority, as well as greater cooperation and coordination among the authorities that examine dealers for compliance with MSRB rules.

[26] *See id.* at 13895–13896.

[27] *See id.* at 13896.

[28] *See id.*

[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See id.* at 13916.

[35] *See id.* at 13918.

[36] The compliance date for the MSRB's amendments to Rule G–12(b)(ii)(B)–(D) and MSRB Rule G–15(b)(ii)(B)–(C) to transition to T+1 settlement for regular-way municipal securities transactions would also be correspondingly modified to remain aligned with the Commission's revised compliance date. *See* Exchange Act Release No. 97585 (May 25, 2023), 88 FR 35961 (June 1, 2023) (File No. SR–MSRB–2023–03).

[37] 15 U.S.C. 78*o*–4(b)(2).

[38] 15 U.S.C. 78*o*–4(b)(2)(C).

[39] *Id.*

The MSRB believes that the proposed rule change will also foster cooperation with other market participants and assist in timely and orderly settlement of securities transactions, because many dealers will have relationships across multiple investment advisers, custodians, and other types of agents, and therefore could be instrumental in introducing better processes and procedures across a range of different relationships. These improvements to facilitate same-day allocations, confirmations, and affirmations can in turn facilitate an orderly and efficient transition to a T+1 settlement cycle. The proposed rule change would incentivize dealers to identify and deploy effective practices for achieving allocations, confirmations, and affirmations ex ante, thereby improving the rate of allocations, confirmations, and affirmations over time, which in turn can enhance the adoption of the industry's move to T+1.

Facilitation of a shorter settlement cycle would remove impediments to and perfect the mechanism of a free and open market in municipal securities by yielding long-term benefits of promoting an orderly settlement process and reducing the likelihood of exceptions or other processing errors that could lead to settlement failures.[40] The proposed rule change would allow for agreements or policies and procedures to be in place that would give dealers means by which to address the obstacles in same-day affirmation, allocation, and confirmation processes which are instrumental in timely settlement of transactions. The sooner the parties can affirm the trade information for their transaction, the lower the likelihood of a settlement failure, which may give parties time to resolve any errors, improve processes over time and implement new technologies instead of ''just in time'' solutions that can cause delays in timely settlement of transactions. This would foster continued improvements in institutional trade processing, further promote accuracy and efficiency, reduce the potential for settlement fails, and more generally, reduce the potential for operational risk, which would promote investor protection and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Exchange Act[41] requires that MSRB rules not be designed to impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The MSRB believes that the proposed rule change would not impose any unnecessary or inappropriate burden on competition, as the proposed rule change would apply a uniform standard for a same-day allocation, confirmation and affirmation for all transactions in municipal securities to align with the newly revised standard applicable to, among other securities, equity and corporate bond transactions under the amended Exchange Act Rule 15c6–2. In addition, the proposed rule change would be applied equally to all dealers. Therefore, the MSRB believes the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The MSRB was guided by the MSRB's Policy on the Use of Economic Analysis in MSRB Rulemaking.[42] In accordance with this policy, the MSRB has evaluated the potential impacts on competition of the proposed rule change. The proposed rule change would add a new section (k) to the rule that would establish a core-standard of a same-day allocation, confirmation and affirmation for all transactions in municipal securities.

Although the proposed rule change would be applied equally to dealers, the MSRB acknowledges potential burdens for firms that only participate in the municipal securities market, and those firms likely have relatively smaller revenue bases than firms that also trade other securities. These firms may incur costs associated with system changes to achieve a ''same-day affirmation,'' and may be disproportionately impacted by changes that would require investments in working towards ensuring the same-day affirmation in that such costs would be borne solely by their municipal securities activities whereas other firms with a more diversified securities business likely would have already invested in the cost of coming into compliance with Exchange Act Rule 15c6–2 across their business lines. However, the MSRB believes the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act,[43] as any such regulatory burden would be necessary or appropriate to align with the newly revised standard applicable to other securities under the amended Exchange Act Rule 15c6–2 to facilitate compliance with the upcoming T+1 settlement obligations. Without the proposed amendments, market participants would encounter different standards between municipal securities and other securities such as equity and corporate bonds, which could result in market inefficiencies and cause confusion, especially for investors who trade both municipal securities and other securities. Accordingly, the proposed rule change would be in the public interest and ultimately for the protection of investors, municipal entities, and obligated persons.[44] In addition, dealers may encounter difficulty complying with the upcoming T+1 settlement obligations without the analogous Exchange Act Rule 15c6–2 requirements that the proposed rule change would incorporate into Rule G–12.

Benefits, Costs and Effect on Competition

The MSRB considered the economic impact associated with the proposed rule change, relative to the baseline, which is the current Rule G–12 that does not align with Exchange Act Rule 15c6–2 on same-day allocation, confirmation and affirmation, and assessed incremental changes in benefits and costs in the proposed future state of a same-day allocation, confirmation and affirmation process, in both cases in light of the already approved move to a T+1 settlement cycle in May 2024.

Benefits

The proposed rule change would facilitate compliance with the upcoming T+1 settlement obligations. The proposed rule change would help expedite the transmission and affirmation of trade data that is expected to enhance the accuracy and efficiency of institutional trade processing. The MSRB also expects that the same-day allocation, confirmation and affirmation standard would encourage the development of more standardized and automated dealer practices. While much of the industry has moved to a same-day allocation, confirmation and affirmation standard, the MSRB understands that there remain outliers who have not yet done so. By adopting a settlement process, either by agreement or

[40] Commission T+1 Adopting Release, 88 FR at 13897.

[41] 15 U.S.C. 78*o*–4(b)(2)(C).

[42] Policy on the Use of Economic Analysis in MSRB Rulemaking is available at *http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx*. In evaluating whether there was any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act, the MSRB was guided by its principles that required the MSRB to consider costs and benefits of a rule change, its impact on capital formation and the main reasonable alternative regulatory approaches.

[43] 15 U.S.C. 78*o*–4(b)(2)(C).

[44] *Id.*

strengthening existing policies and procedures, the MSRB believes that more institutional trades would be successfully processed and receive an affirmed confirmation on the same trade date. The proposed rule change for regular-way municipal securities transactions in the secondary market would be consistent with Exchange Act Rule 15c6–2, which applies to equity and corporate bond transactions. Market efficiencies could be eroded if market participants encounter differing allocation, confirmation and affirmation standards in settlement cycles when trading equity securities or corporate bonds along with municipal securities. Finally, the MSRB expects that an increase in same-day affirmation rates would help reduce the number of settlement failures as affirmations on the same-day can help mitigate the risk of errors.

Costs

The MSRB believes that some dealers would incur costs associated with systems changes to achieve a same-day allocation, confirmation and affirmation standard. For upfront costs, dealers would need to create written agreements for relevant parties and/or update existing policies and procedures. While firms may already have written agreements as part of their practices, firms would still need to review the existing policies and procedures framework to ensure their compliance with the proposed rule change. There would also be ongoing costs associated with compliance and recordkeeping in relation to the written policies and procedures and written agreements, including measuring and documenting the rate at which trades are meeting a same-day allocation, confirmation and affirmation standard.

The T+1 settlement obligation is applicable to all firms regardless of how many asset classes they trade, and firms that only participate in the municipal securities market may be disproportionately impacted by changes that could require system or staffing investments in working towards ensuring a same-day allocation, confirmation and affirmation. This is in contrast to firms that participate in multiple asset classes, for which the incremental costs would be smaller or negligible as these firms are assumed to be in compliance with Exchange Act Rule 15c6–2 obligations for asset classes other than municipal securities (as of the effective date of those obligations). For the limited number of dealers who only trade municipal securities, the MSRB assumes these dealers would likely choose the second option of establishing policies and procedures to comply with the proposed rule change, as the first option of entering written agreements could generally be more costly unless a particular dealer already uses written agreements to manage their relationship with their customers.[45] The MSRB estimates that one-time upfront costs for system upgrades and policy and procedure revisions would be approximately $44,440 per firm and that ongoing annual costs for compliance and recordkeeping would be approximately $3,448 per firm. This calculation is based on the Commission's upper-bound estimates of $88,880 per firm for the one-time upfront cost and $172,416 per firm for the annual ongoing cost when including all securities, other than an exempted security (a government security, a municipal security, commercial paper, bankers' acceptances, or commercial bills).[46]

Burden on Competition and Capital Formation

The proposed rule change would promote regulatory consistency and market efficiency by adopting a consistent standard of completing the trade matching and affirmation process on the trade date for all securities and harmonizing with Exchange Act Rule 15c6–2. The proposed rule change would also facilitate compliance with the upcoming T+1 settlement obligations. As a result, the MSRB believes that by providing a uniform standard across all asset classes the proposed rule change would foster capital formation.

The proposed rule change would be applied equally to all dealers transacting in municipal securities. The MSRB assumes that firms that will be subject to newly adopted Exchange Act Rule 15c6–2 would be equipped with the necessary technology and personnel for the completion of the allocation, confirmation and affirmation process on trade date as of the effective date of those obligations. For the remaining limited number of municipal dealers who only trade municipal securities, the estimated upfront costs would be relatively minor though necessary. Finally, the estimated annual ongoing costs would also be minor and would be proportional to each firm's trading activities. Therefore, the MSRB believes any broader impact on competition in the municipal securities market is expected to be minor, and the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Reasonable Alternatives

One alternative the MSRB considered was instead of requiring dealers to develop written agreements or to establish, implement and enforce policies and procedures as prescribed in proposed Rule G–12(k), the proposed rule change would require dealers to have adequate policies and procedures in place that can support allocation. This principle-based approach would allow dealers to customize their policies and procedures while still proceeding towards the ultimate goal of same-day allocation, confirmation and affirmation. However, while this alternative may provide dealers more flexibility, it does not necessarily guarantee achieving same-day allocation, confirmation and affirmation, and does not facilitate the adoption of ''timely settlement.'' For example, while this principle-based approach may accelerate the allocation, confirmation and affirmation process for dealers, it may not lead to a market-wide adoption of same-day allocation, confirmation and affirmation standard immediately without the prescriptive obligations specified in policies and procedures in the proposed rule change for all dealers. In any case, the proposed rule change would promote an orderly settlement process regardless of the length of the settlement cycle.

Another alternative would be to provide only one option for dealers to achieve a same-day allocation, confirmation and affirmation, for example, by withdrawing the written agreement requirement and instead only requiring the policies and procedures approach. This alternative would allow dealers to adopt their own internal policies and procedures to ensure that allocations, confirmations, and affirmations are completed on a timeline that would facilitate settlement on T+1. However, this approach could be more

[45] *See* Commission T+1 Adopting Release, 88 FR at 13938. There is also a possibility that the industry would develop a standard written agreement for investors to complete and send to dealers over the longer term, but the MSRB is not aware of the possibility currently.

[46] *See id.,* 88 FR at 13946. The Commission estimated 411 broker-dealers would be subject to the requirements of Exchange Act Rule 15c6–2. *Id.* at 13939. The MSRB's internal analysis assumes a cost saving of 50% for the one-time upfront cost for municipal securities only, as opposed to many other securities, such as equities, corporate bonds, asset-backed securities, mortgage-backed securities, and stock options, etc., accounting for some fixed costs when working on a single security product. For the ongoing cost, the MSRB estimated the number of trades for municipal securities would be less than 2% of trades for other securities. Conservatively, two percentage points are used for estimating the ongoing costs related to municipal securities. The MSRB believes these estimates reflect an upper bound on the compliance costs.

costly for certain dealers who may already have written agreements in place or would want to rely on written agreements over incurring compliance costs of establishing, implementing and enforcing policies and procedures. Thus, the MSRB has determined that the proposed rule change is superior to the potential alternative approaches because it would offer two options for dealers to work towards a same-day allocation, confirmation and affirmation standard, thereby facilitating a timely settlement.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received on the proposed rule change. However, in connection with the MSRB's filing to adopt a T+1 settlement process for municipal securities,[47] one commenter expressed general support to have consistent rules for municipal securities with those for equities and corporate bonds whenever possible.[48] Specifically, the commenter encouraged the MSRB to consider a rule consistent with Exchange Act Rule 15c6–2, to improve the processing of institutional trades through new requirements for market participants related to same-day affirmations.[49]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MSRB–2023–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–MSRB–2023–07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–MSRB–2023–07 and should be submitted on or before January 18, 2024.

For the Commission, pursuant to delegated authority.[50]

Christina Z. Milnor,

Assistant Secretary.

[FR Doc. 2023–28612 Filed 12–27–23; 8:45 am]

BILLING CODE 8011–01–P

[47] Exchange Act Release No. 97257 (Apr. 6, 2023), 88 FR 22075 (Apr. 12, 2023) (File No. SR–MSRB–2023–03).

[48] *See* Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (May 3, 2023), available at *https://www.sec.gov/comments/sr-msrb-2023-03/srmsrb202303-183739-336923.pdf*.

[49] *See id.*

[50] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

AGENCY: Small Business Administration.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before February 26, 2024.

Comments: Send all comments by email to Louis A. Cupp, New Markets Policy Analyst, Policy Division, Office of Investment and Innovation, Small Business Administration, *louis.cupp@sba.gov*.

FOR FURTHER INFORMATION CONTACT: Lyn Womack, Director, Fund Administration and Fund Accounting Division, Office of Investment and Innovation, *lyn.womack@sba.gov,* 202–205–2416, or Curtis B. Rich, Agency Clearance Officer, 202–205–7030, *curtis.rich@sba.gov*.

SUPPLEMENTARY INFORMATION: Applicants for SBA-guaranteed leverage commitments must complete these forms as part of the application process. SBA uses the information to make informed and proper credit decisions and to establish the SBIC's eligibility for leverage and need for funds.

Solicitation of Public Comments:

SBA is requesting comments on (a) whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

Collection: 3245–0081

(1) Title: Form 25 LLGP Model Limited Liability General Partner Certificate, Form 25 PCGP Model Resolution SBIC organized as Corporate General Partnership, Form 25 PC Model Resolution SBIC organized as

Corporation, Form 33 Instructions for the Authorization to Disburse Proceeds, Form 34 Bank Identification, Form 1065 Applicant Licensee's Assurance of Compliance for the Public Interest.

Description of Respondents: Eligible SBICs.

Form Number: SBA Forms 25 LLGP, 25 PCGP, 25 PC, 33, 34, 1065.

Total Estimated Annual Responses: 60.

Total Estimated Annual Hour Burden: 41 hours.

Curtis Rich,

Agency Clearance Officer.

[FR Doc. 2023–28628 Filed 12–27–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 12295]

30-Day Notice of Proposed Information Collection: I2U2 Project Proposal Submission Template

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: The Department will accept comments from the public up to January 29, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* I2U2 Project Proposal Submission Template.
- *OMB Control Number:* 1405–0261.
- *Type of Request:* Extension of a currently approved collection.
- *Originating Office:* Office of the Under Secretary for Economic Growth, Energy, and the Environment.
- *Respondents:* Individuals.
- *Estimated Number of Respondents:* 10.
- *Estimated Number of Responses:* 10.
- *Average Time per Response:* 1 hour.
- *Total Estimated Burden Time:* 10 hours.
- *Frequency:* Once.
- *Obligation to Respond:* Voluntary.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

I2U2 is a partnership between the heads of government of India, Israel, the United Arab Emirates, and the United States. This grouping of countries identifies bankable projects and initiatives, with a particular focus on joint investments and new initiatives in water, energy, transportation, space, health, food security, and technology. The I2U2 initiative aims to mobilize private sector capital and expertise to achieve a variety of economic goals.

The purpose of this collection is to gather the required details necessary to determine if applicants' projects qualify to participate in the I2U2 initiative. This information is necessary to select participants and share information with I2U2 partners. The window to receive project proposals will remain open as long as the I2U2 initiative exists.

I2U2 will consider projects and initiatives on an individual basis that meet the following criteria:

1. Fall into at least one of these seven sectors: water, climate/energy, transportation, space, health, food security, or technology.

2. Preferably operate in the Middle East, India, the United States, or Africa. However, the I2U2 Group will consider opportunities anywhere in the world.

3. Allow each of the four partner countries to benefit from and/or contribute to the project. Priority will be given to projects based on cooperation and/or involvement of participants from all four I2U2 partner countries.

Respondents will access to the form at *www.state.gov/I2U2.* Following these criteria, the form asks individuals to select the applicable sectors and explain the proposed role of/benefits to each partner country. The form also requests details about the project submitter, any monetary and nonmonetary requests, and a description of the project and timeline. I2U2 will utilize this form for vetting, review, and selection of project submissions. Submitters may also optionally provide additional supporting documentation, such as a detailed budget, marketing brochure, or other relevant materials.

Methodology

The collection will be completed 100 percent electronically. The respondent will complete the form online and submit the form by email to *I2U2@state.gov.*

Kevin E. Bryant,

Deputy Director, Office of Directives Management, Department of State.

[FR Doc. 2023–28601 Filed 12–27–23; 8:45 am]

BILLING CODE 4710–10–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36729]

Macquarie Infrastructure Partners V GP, LLC—Control Exemption—Northern Indiana Railroad Company, LLC

By petition filed on September 28, 2023, Macquarie Infrastructure Partners V GP, LLC (MIP GP), on behalf of itself; Macquarie Infrastructure Partners V fund vehicle (MIP V); MIP V Rail, LLC (MIP Rail); and Gulf & Atlantic Railways, LLC (G&A) (collectively, Petitioners), seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 11323 to acquire and control the Northern Indiana Railroad Company (NIRC), a Class III carrier. As discussed below, the Board will grant the exemption.

Background

G&A is a noncarrier that directly controls [1] the following rail common carriers: Camp Chase Rail, LLC; Chesapeake and Indiana Railroad LLC (CKIN); Vermilion Valley Railroad LLC;

[1] G&A is wholly owned by MIP Rail, which is indirectly controlled by MIP GP. (Pet. 5–6.) MIP V is controlled by MIP GP and (indirectly) wholly owns MIP Rail. (*Id.* at 6.) Therefore, MIP GP, MIP V, and MIP Rail indirectly control the above rail common carriers. (*Id.* at 6.)

Grenada Railroad, LLC; and Florida, Gulf & Atlantic Railroad, LLC. *See Macquarie Infrastructure Partners V GP, LLC—Control Exemption—Camp Chase Rail, LLC,* FD 36685 (STB served Apr. 7, 2023). G&A has also been authorized to directly control (and MIP GP, MIP V, and MIP Rail authorized to indirectly control) the Pioneer Valley Railroad Company. *See Macquarie Infrastructure Partners V GP, LLC—Control Exemption—Pioneer Valley R.R.,* FD 36720 (STB served Sept. 13, 2023).

Pursuant to a purchase agreement dated March 17, 2023, G&A has agreed to acquire 100% of the equity interests in NIRC. Upon consummation of this transaction, G&A would directly control NIRC, while MIP GP, MIP V, and MIP Rail would indirectly control NIRC. (Pet. 5.) According to the petition, NIRC owns 32.97 miles of rail line in Indiana, but has never conducted freight rail operations over the line. (*Id.* at 4.) CKIN (which is controlled by G&A) has leased and operated the NIRC line since 2004. (*Id.*) Currently, CKIN leases and operates 27.52 miles of line from NIRC because CKIN discontinued service over the remaining 5.45-mile segment in 2017. (*Id.*) Petitioners state that the 5.45-mile segment remains part of the national rail network, but there have not been any freight operations over that segment since at least 2015.[2]

In support of the petition, Petitioners assert that the transaction will bring G&A's financial strength and management expertise to NIRC, unite ownership and operation of the line in the same corporate family, and enhance NIRC's access to capital, thereby ''facilitating future strategic investment decisions with respect to the line.'' (*Id.* at 7.) Petitioners state that the transaction will not affect operations or service to customers because CKIN already serves those customers under its lease agreement with NIRC.[3] (*Id.* at 11–12.)

[2] Petitioners note that pursuant to an agreement with the Town of North Judson, the Hoosier Valley Railroad Museum operates excursion trains on the 5.45-mile segment over which freight rail service has been discontinued. (*Id.* at 4 n.10.) Petitioners further state that the Museum will continue to have the right to provide excursion passenger service on that segment. (*Id.* at 12 n.15.)

[3] Petitioners explain that the proposed transaction does not qualify for the class exemption under 49 CFR 1180.2(d)(2) because the class exemption is unavailable when one or more railroads in an existing corporate family would connect with the railroad being acquired. (*Id.* at 4.) Here, because CKIN's leasehold interest does not overlap entirely with the line owned by NIRC, Petitioners have concluded that there is a point of connection. (*Id.* at 4–5.)

Discussion and Conclusions

The acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers requires prior approval from the Board under 49 U.S.C. 11323(a)(5). Under 49 U.S.C. 10502(a), however, the Board shall, to the maximum extent possible, exempt a transaction or service from regulation upon finding that (1) the regulation is not necessary to carry out the rail transportation policy (RTP) under 49 U.S.C. 10101 and (2) either the transaction or service is of limited scope, or regulation is not needed to protect shippers from the abuse of market power.

In this case, an exemption from the prior approval requirements of 49 U.S.C. 11323–25 is consistent with the standards of 49 U.S.C. 10502. Detailed scrutiny of the proposed transaction through an application for review and approval under sections 11323–25 is not necessary to carry out the RTP. An exemption would promote the RTP by minimizing the need for federal regulatory control over the transaction, 49 U.S.C. 10101(2), and providing for the expeditious resolution of this proceeding, 49 U.S.C. 10101(15). Further, Petitioners assert that consolidated ownership and operation of the line within the same corporate family will improve operating economies and the financial viability of the line. (Pet. 7). Therefore, an exemption would promote the RTP by promoting a safe and efficient rail transportation system, 49 U.S.C. 10101(3); ensuring the development and continuation of a sound rail transportation system that would continue to meet the needs of the public, 49 U.S.C. 10101(4); and fostering sound economic conditions in transportation, 49 U.S.C. 10101(5). Other aspects of the RTP would not be adversely affected.

Regulation of the transaction is not needed to protect shippers from abuse of market power.[4] The record indicates that NIRC does not conduct freight rail operations, and most of its line is currently operated by CKIN pursuant to a lease. (Pet. 4.) Petitioners state that ''th[e]se leasehold operations will continue without change.'' (*Id.* at 13.) Thus, the proposed transaction will not result in any material changes to the rates and services available to shippers along NIRC's line. Moreover, no shipper or other entity has objected to the proposed transaction.

[4] Given this finding, the Board need not determine whether the transaction is limited in scope. *See* 49 U.S.C. 10502(a).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III carriers. Therefore, because all of the carriers involved in the transaction are Class III carriers, the Board may not impose labor protective conditions.

Under 49 CFR 1105.6(c)(1), this action, which will not result in significant changes in carrier operations, is categorically excluded from environmental review. Similarly, under 49 CFR 1105.8(b)(1), no historic report is required because the subject transaction is for continued rail service; Petitioners have indicated no plans to alter railroad properties 50 years old or older; and any future abandonment of the Line would be subject to Board jurisdiction.

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts the above transaction from the prior approval requirements of 49 U.S.C. 11323–25.

2. Notice of this exemption will be published in the **Federal Register**.

3. This decision will be effective on January 21, 2024. Petitions for stay must be filed by January 2, 2024. Petitions to reopen must be filed by January 11, 2024.

Decided: December 21, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2023–28716 Filed 12–27–23; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0229]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: White Lightning (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this

notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 29, 2024.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0229 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov*. Search MARAD–2023–0229 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of Transportation, MARAD–2023–0229, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov*.

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel White Lightning is:

Intended Commercial Use of Vessel: Requester intends to use the boat for passenger vessel charters.

Geographic Region Including Base of Operations: Alaska, California, Washington. Base of Operations: Mercer Island, WA.

Vessel Length and Type: 85′ Catamaran.

The complete application is available for review identified in the DOT docket as MARAD 2023–0229 at *https://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *https://www.regulations.gov,* keyword search MARAD–2023–0229 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov*. Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy*.

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–28638 Filed 12–27–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0227]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: ODIN (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 29, 2024.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0227 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0227 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of Transportation, MARAD–2023–0227, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel ODIN is:

—*Intended Commercial Use of Vessel:* Requester intends to use this boat for charter.
—*Geographic Region Including Base of Operations:* Maine, Massachusetts, Rhode Island, Connecticut, New York, Delaware, Florida. Base of Operations: Sag Harbor, NY.
—*Vessel Length and Type:* 126′ Motor yacht.

The complete application is available for review identified in the DOT docket as MARAD 2023–0227 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *https://www.regulations.gov,* keyword search MARAD–2023–0227 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–28634 Filed 12–27–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0230]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: Ra (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 29, 2024.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0230 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search

MARAD–2023–0230 and follow the instructions for submitting comments.

• *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of Transportation, MARAD–2023–0230, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel Ra is:

—*Intended Commercial Use of Vessel:* Requester intends to use this boat for passenger vessel charters, cruises, and transfers.

—*Geographic Region Including Base of Operations:* Florida. Base of Operations: Clearwater Beach, FL.

—*Vessel Length and Type:* 36′ Catamaran Cruiser.

The complete application is available for review identified in the DOT docket as MARAD 2023–0230 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *https://www.regulations.gov,* keyword search MARAD–2023–0230 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–28636 Filed 12–27–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0226]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: OFF WATCH (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 29, 2024.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0226 by any one of the following methods:

• *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0226 and follow the instructions for submitting comments.

• *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of

Transportation, MARAD–2023–0226, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel OFF WATCH is:

—*Intended Commercial Use of Vessel:* Requester intends to use this boat for charter and tours.

—*Geographic Region Including Base of Operations:* Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida. Base of Operations: Punta Gorda, FL.

Vessel Length and Type: 35.7′ Cruising Trawler.

The complete application is available for review identified in the DOT docket as MARAD 2023–0226 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *https://www.regulations.gov,* keyword search MARAD–2023–0226 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–28635 Filed 12–27–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0231]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: TACKLE BOX (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 29, 2024.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0231 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0231 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of Transportation, MARAD–2023–0231, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m.,

Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel TACKLE BOX is:

—*Intended Commercial Use of Vessel:* Requester intends to use this boat for sportfishing and reef fishing charters.

—*Geographic Region Including Base of Operations:* North Carolina, South Carolina, Georgia, Florida. Base of Operations: Fort Pierce, FL.

—*Vessel Length and Type:* 34′ Sportfish.

The complete application is available for review identified in the DOT docket as MARAD 2023–0231 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *https://www.regulations.gov,* keyword search MARAD–2023–0231 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–28637 Filed 12–27–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0228]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: MIKHAYA (Sail); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 29, 2024.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0228 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0228 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of Transportation, MARAD–2023–0228, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a

telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel MIKHAYA is:

—*Intended Commercial Use of Vessel:* Requester intends to use this boat for day and night charters.
—*Geographic Region Including Base of Operations:* Florida. Base of Operations: Ormond Beach, FL.
—*Vessel Length and Type:* 42′ Sailboat.

The complete application is available for review identified in the DOT docket as MARAD 2023–0228 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *https://www.regulations.gov,* keyword search MARAD–2023–0228 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

Privacy Act

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–28633 Filed 12–27–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons whose property and interests in property have been unblocked and who have been removed from OFAC's Specially Designated Nationals and Blocked Persons List (SDN List).

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley T. Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Compliance, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On December 20, 2023, OFAC removed the following persons from the SDN List and determined that the property and interests in property subject to U.S. jurisdiction of the following persons are unblocked.

Individuals

1. ACOSTA URUETA, Yaneth (a.k.a. ACOSTA URUETA, Janeth; a.k.a. ACOSTA URUETA, Yaneth del Socorro), c/o HODWALKER Y LEAL Y CIA. S.C.A., Barranquilla, Colombia; c/o MARTIN HODWALKER M. & CIA. S. EN C., Barranquilla, Colombia; DOB 10 Nov 1965; POB Colombia; nationality Colombia; citizen Colombia; Cedula No. 57411214 (Colombia) (individual) [SDNT].

2. ARAMBULA GARCIA, Luz del Rocio (a.k.a. ARAMBULA DE FLORES, Luz del Rocio), C. Las Palmas No. 2700 Int. 14, Colonia Atlas Colomos, Zapopan, Jalisco, Mexico; Avenida Hidalgo 1890, Colonia Ladron de Guevara, Guadalajara, Jalisco,

Mexico; DOB 06 Jan 1949; alt. DOB 05 Jan 1949; POB Jalisco, Mexico; nationality Mexico; citizen Mexico; Passport 98140030684 (Mexico); R.F.C. AAGL–490105 (Mexico); alt. R.F.C. AAGL–490105–9F9 (Mexico); C.U.R.P. AAGL490106MJCRRZ00 (Mexico); alt. C.U.R.P. AAGL490106HJCRRZ00 (Mexico) (individual) [SDNT].

3. BODDEN GALE, Elvert Dowie (a.k.a. ''TIO BODDEN''), Roatan, Honduras; DOB 24 Apr 1956; POB Honduras; Passport A046090 (Honduras) (individual) [SDNT].

4. CADENAS VIRAMONTES, Porfirio Miguel, Calle Nelson 421–B, Guadalajara, Jalisco, Mexico; Calle Justo Sierra 1963, Colonia Ladron de Guevara, Guadalajara, Jalisco, Mexico; Calle Mar del Sur No 2075 Int. 1, Colonia Fraccionamiento Country Club, Guadalajara, Jalisco, Mexico; c/o MC OVERSEAS TRADING COMPANY S.A. DE C.V., Guadalajara, Mexico; c/o OVERSEAS TRADING COMPANY S.A., Guatemala City, Guatemala; c/o INMOBILIUM INVESTMENT CORP., Panama City, Panama; DOB 12 Jun 1959; POB Guadalajara, Jalisco, Mexico; Passport 97140096573 (Mexico); R.F.C. CAVP–590612–AD1 (Mexico); NIT # 2665307–9 (Guatemala); C.U.R.P. CAUP590612HJCDRR09 (Mexico) (individual) [SDNT].

5. CAICEDO ROJAS, Jorge Ernesto, Calle 82 No 11–37 Ofc. 504, Bogota, Colombia; DOB 21 Oct 1955; POB Bogota, Colombia; Cedula No. 3227987 (Colombia) (individual) [SDNT] (Linked To: HOTEL LA CASCADA S.A.).

6. CALVO LOMBANA, Gabriel Andres, c/o ORIMAR LTDA., Bogota, Colombia; c/o AQUAMARINA ISLAND INTERNATIONAL CORPORATION, Panama City, Panama; c/o FISHING ENTERPRISE HOLDING INC., Panama City, Panama; DOB 20 Aug 1935; POB Bogota, Colombia; Cedula No. 2859105 (Colombia) (individual) [SDNT].

7. CASTELLANOS SANCHEZ, Federico Ernesto, Calle Tauro No. 4090, Colonia Juan Manuel Vallarte, Zapopan, Jalisco, Mexico; c/o MC OVERSEAS TRADING COMPANY S.A. DE C.V., Guadalajara, Mexico; DOB 11 Jan 1947; POB Tototlan, Jalisco, Mexico (individual) [SDNT].

8. CASTRILLON VASCO, Jhon Jairo; DOB 30 Mar 1960; POB Medellin, Colombia; Cedula No. 71603587 (Colombia) (individual) [SDNT] (Linked To: HOTEL LA CASCADA S.A.; Linked To: INVERSIONES Y REPRESENTACIONES S.A.).

9. CASTRO GARZON, Victor Hugo (a.k.a. ''CABEZON''), Guadalajara, Jalisco, Mexico; DOB 10 May 1965; POB Barranquilla, Colombia; Cedula No. 72137257 (Colombia) (individual) [SDNT].

10. CASTRO GARZON, Ricardo (a.k.a. LINEROS GARZON, Rodolfo; a.k.a. ''CAYO''), c/o CASTRO CURE Y CIA. S.C.S., Barranquilla, Colombia; c/o CURE SABAGH Y CIA. S.C.S., Barranquilla, Colombia; c/o FUDIA LTDA., Barranquilla, Colombia; c/o CABLES NACIONALES S.A., Barranquilla, Colombia; c/o INVERSIONES AGROPECUARIA ARIZONA LTDA., Barranquilla, Colombia; DOB 13 Dec 1960; POB Barranquilla, Colombia; Cedula No. 8715520 (Colombia) (individual) [SDNT].

11. CASTRO PAEZ, Gerardo, c/o CABLES NACIONALES CANAL S.A., Barranquilla, Colombia; c/o ORIMAR LTDA., Bogota, Colombia; DOB 16 Mar 1974; POB Barranquilla, Colombia; Cedula No. 72196638 (Colombia) (individual) [SDNT].

12. CHOW RIOS, Harding Elvis; DOB 02 Apr 1962; POB San Andres, Colombia; Cedula No. 15243752 (Colombia) (individual) [SDNT].

13. CURE SABAGH, Diana Maria, c/o CASTRO CURE Y CIA. S.C.S., Barranquilla, Colombia; c/o CURE SABAGH Y CIA. S.C.S., Barranquilla, Colombia; c/o FUDIA LTDA., Barranquilla, Colombia; c/o CABLES NACIONALES CANAL S.A., Barranquilla, Colombia; DOB 24 Oct 1967; POB Barranquilla, Colombia; Cedula No. 22443685 (Colombia) (individual) [SDNT].

14. DE MARTINI TAMAYO, Sergio Rene (a.k.a. ''CANOSO''); DOB 14 Sep 1962; POB Medellin, Colombia; Cedula No. 71622812 (Colombia) (individual) [SDNT].

15. FERNANDEZ CASTRO, Fernando Alberto (a.k.a. ''FERCHO''), c/o GIMNASIO BODY AND HEALTH, Barranquilla, Colombia; DOB 12 May 1966; POB Colombia; Cedula No. 72137518 (Colombia) (individual) [SDNT].

16. FLORES SALINAS, Mario Antonio, C. Las Palmas No. 2700 Int. 14, Colonia Atlas Colomos, Zapopan, Jalisco, Mexico; Paseo Lomas del Bosque No. 2700 Int. 14, Colonia Lomas del Bosque, Guadalajara, Jalisco, Mexico; Avenida Hidalgo 1890, Colonia Ladron de Guevara, Guadalajara, Jalisco, Mexico; Tarascos No. 3469–114, Fraccionamiento Monraz, Guadalajara, Jalisco, Mexico; DOB 16 Mar 1937; alt. DOB 16 Mar 1940; alt. DOB 06 Mar 1940; POB Zacatecas, Mexico; nationality Mexico; citizen Mexico; Passport 98140065448 (Mexico); R.F.C. FOSM–370316–K24 (Mexico); alt. R.F.C. FOSM–400316–K27 (Mexico); alt. R.F.C. FOSM–370316–K12 (Mexico); alt. R.F.C. FOSM–400316 (Mexico); C.U.R.P. FOSM370316HZSLLR06 (Mexico) (individual) [SDNT].

17. GARCIA BUITRAGO, Miyer Alberto (a.k.a. ''CHIQUI''); DOB 13 Jul 1970; POB Manzanares, Caldas, Colombia; Cedula No. 10287969 (Colombia); Passport AH132212 (Colombia) (individual) [SDNT].

18. GARCIA RODRIGUEZ, Martha, c/o TRANSPORTES MICHAEL LTDA., Barranquilla, Colombia; c/o COOPERATIVA DE SERVICIO DE TRANSPORTE DE CARGA DE COLOMBIA LTDA., Barranquilla, Colombia; c/o CENTRO DE BELLEZA SHARY VERGARA, Barranquilla, Colombia; POB Colombia; Cedula No. 32761805 (Colombia) (individual) [SDNT].

19. HODWALKER MARTINEZ, Martin David (a.k.a. ''TILO''); DOB 26 Dec 1968; POB Colombia; Cedula No. 8534760 (Colombia); Passport AF465508 Colombia (individual) [SDNT] (Linked To: YAMAHA VERANILLO DISTRIBUIDORES; Linked To: VERANILLO DIVE CENTER LTDA.; Linked To: MARTIN HODWALKER M. & CIA. S. EN C.; Linked To: DESARROLLO GEMMA CORPORATION; Linked To: HODWALKER Y LEAL Y CIA. S.C.A.).

20. HOOKER TAYLOR, Javier Arnulfo (a.k.a. HOOKER POMARE, Javier), c/o COOPERATIVA DE SERVICIO DE TRANSPORTE DE CARGA DE COLOMBIA LTDA., Barranquilla, Colombia; c/o ROCK FISH IMPORT EXPORT E.U., San Andres, Colombia; DOB 19 Feb 1971; POB San Andres, Colombia; Cedula No. 18001893 (Colombia) (individual) [SDNT].

21. HYDE, Clive Norman (a.k.a. HYDE SR., Clive Norman; a.k.a. ''MR. HYDE''); DOB 08 Apr 1956; POB Belize (individual) [SDNT].

22. LEAL LOPEZ, Janey Farides, c/o MARTIN HODWALKER M. Y CIA. S. EN C., Barranquilla, Colombia; c/o VERANILLO DIVE CENTER LTDA., Barranquilla, Colombia; c/o HODWALKER Y LEAL Y CIA. S.C.A., Barranquilla, Colombia; DOB 06 Nov 1972; POB Colombia; Cedula No. 32779104 (Colombia); Passport AF665724 (Colombia) (individual) [SDNT].

23. LOPEZ RODRIGUEZ, Jorge Octavio, c/o CIMIENTOS LA TORRE S.A. DE C.V., Guadalajara, Jalisco, Mexico; c/o CUMBRES SOLUCIONES INMOBILIARIAS S.A. DE C.V., Zapopan, Jalisco, Mexico; Calle Aurora y Andres, Benito Juarez, Quintana Roo, Mexico; Calle Boyero No. 3500, Torre 4, Dpto. 2, Fraccionamiento La Calma, Zapopan, Jalisco, Mexico; DOB 01 Apr 1976; alt. DOB 01 Jan 1976; POB Guadalajara, Jalisco, Mexico; nationality Mexico; citizen Mexico; Passport 98140145654 (Mexico); alt. Passport 01140405557 (Mexico); C.U.R.P. LORJ760401HJCPDR08 (Mexico) (individual) [SDNT].

24. MALDONADO ESCOBAR, Fernando; DOB 16 May 1961; POB Bogota, Colombia; Cedula No. 19445721 (Colombia); Passport AH330349 (Colombia) (individual) [SDNT] (Linked To: AUDITORES ESPECIALIZADOS LTDA.; Linked To: AQUAMARINA ISLAND INTERNATIONAL CORPORATION).

25. MAR SEM, Maria Gloria, c/o MC OVERSEAS TRADING COMPANY S.A. DE C.V., Guadalajara, Jalisco, Mexico; DOB 19 Aug 1944; POB Mexico; Passport 97140093454 (Mexico) (individual) [SDNT].

26. MARKS, Martin Gregory (a.k.a. ''GORDON, Howard A.''); DOB 30 Oct 1958; POB Jamaica; Passport 217720 (Jamaica) (individual) [SDNT].

27. MOLINA MOLINA, Jesus Dagoberto, c/o TRANSPORTES MICHAEL LTDA., Barranquilla, Colombia; c/o COOPERATIVA DE SERVICIO DE TRANSPORTE DE CARGA MULTIMODAL, Barranquilla, Colombia; POB Colombia; Cedula No. 8233532 (Colombia) (individual) [SDNT].

28. OCHOA VASCO, Fabio Enrique (a.k.a. GONZALEZ ZAPATA, Antonio; a.k.a. MARTINEZ PEREZ, Juan Carlos; a.k.a. OCHOA VASCO, Carlos Mario; a.k.a. VEGA TOBON, Carlos Mario; a.k.a. ''CARLOS MARIO''; a.k.a. ''KIKO''; a.k.a. ''KIKO EL CHIQUITO''), Medellin, Antioquia, Colombia; Av Miguel Angel 18, Real Vallarta, Zapopan, Jalisco 44020, Mexico; Av Mexico 2867–17, Col Vallarta, Norte, Guadalajara, Jalisco 44690, Mexico; DOB 20 Nov 1960; alt. DOB 20 Nov 1963; POB Medellin, Colombia; Cedula No. 79281039 (Colombia); alt. Cedula No. 15508422 (Colombia); Passport AE063894 (Colombia) (individual) [SDNT].

29. PALACIO ADARVE, John Ricardo; DOB 11 Mar 1969; POB Itagui, Antioquia, Colombia; Cedula No. 70697538 (Colombia) (individual) [SDNT].

30. RINCONES MENDOZA, Henry Juvenal; DOB 25 Sep 1976; POB Colombia; Cedula No. 79863543 (Colombia) (individual) [SDNT].

31. TRUJILLO MOLINA, Maria Helena (a.k.a. TRUJILLO MOLINA, Maria Elena), c/o HOTEL LA CASCADA S.A., Girardot, Colombia; c/o INVERSIONES Y REPRESENTACIONES S.A., Medellin, Colombia; POB Colombia; Cedula No. 42875026 (Colombia) (individual) [SDNT].

32. VALENCIA MARIN, Libardo Elias; DOB 23 Mar 1946; POB Colombia; Cedula No. 8225623 (Colombia) (individual) [SDNT].

33. VARELA SERNA, Carlos Heneris (a.k.a. ''COLITAS''), c/o TRANSPORTES MICHAEL LTDA., Barranquilla, Colombia; c/o COOPERATIVA DE SERVICIO DE TRANSPORTE DE CARGA DE COLOMBIA LTDA., Barranquilla, Colombia; c/o CENTRO DE BELLEZA SHARY VERGARA, Barranquilla, Colombia; DOB 11 Jan 1956; POB Cali, Colombia; Cedula No. 16632290 (Colombia) (individual) [SDNT].

34. WORRELL, Gareth Bruce (a.k.a. WORRELL MURRAY, Gareth Bruce; a.k.a. WORRELL MURRAY, Garrett; a.k.a. ''GARETH MOREY''); DOB 19 Jun 1971; alt. DOB 19 Jan 1971; POB Belize; Passport 0159817 (Belize) (individual) [SDNT].

35. YEPES VELEZ, Silvio (a.k.a. YEPEZ VELEZ, Silvio), Carrera 30 No. 77–26, Bogota, Colombia; c/o HOTEL LA CASCADA S.A., Girardot, Colombia; DOB 09 Nov 1948; POB Manizales, Caldas, Colombia; Cedula No. 19065009 (Colombia); NIT # 19065009–4 (Colombia) (individual) [SDNT].

Entities

1. AQUAMARINA ISLAND INTERNATIONAL CORPORATION, Avenida Cuba Calle 38, Edificio Los Cristales Piso 3, Panama City, Panama; Calle 93 No. 14–20 Ofc. 611, Bogota, Colombia; Avenida del Pastelillo 24–46, Edificio Fadia—Manga, Cartagena, Colombia; RUC # 2120851397079 (Panama) [SDNT].

2. AUDITORES ESPECIALIZADOS LTDA., Calle 93 No. 14–20 Ofc. 611, Bogota, Colombia; NIT # 830041980–1 (Colombia) [SDNT].

3. CABLES NACIONALES S.A. (a.k.a. CANAL S.A.), Calle 111 No. 34–139, Barranquilla, Colombia; NIT # 802005017–7 (Colombia) [SDNT].

4. CASTRO CURE Y CIA. S. EN C., Calle 111 No. 34–139, Barranquilla, Colombia; NIT # 802001885–5 (Colombia) [SDNT].

5. CENTRO DE BELLEZA SHARY VERGARA, Carrera 54 No. 72–80 Local 25, Barranquilla, Colombia [SDNT].

6. CIMIENTOS LA TORRE S.A. DE C.V. (f.k.a. ACTIVOS PARA EL DESARROLLO ISLA BLANCA S.A. DE C.V.), Calle San Uriel 690, Interior 10, Piso 4, Colonia Chapalita, Guadalajara, Jalisco, Mexico [SDNT].

7. COMERCIALIZADORA MOR GAVIRIA S.A. (a.k.a. ALFOMBRAS DURATEX DE COLOMBIA; a.k.a. ''DURATEX ECUADOR''), Avenida Pedro Vicente Maldonado N229 y Rivas, Edificio Centro Comercial El Recreo, Local 24F, Pichincha, Quito, Ecuador; RUC # 1791813359001 (Ecuador) [SDNT].

8. COMERCIALIZADORA MORDUR S.A., Avenida Pedro Vicente Maldonado 14–205, Edificio Centro Comercial El Recreo, Local 22F, Pichincha, Quito, Ecuador; RUC # 1791315820001 (Ecuador) [SDNT].

9. COOPERATIVA DE SERVICIO DE TRANSPORTE DE CARGA DE COLOMBIA LTDA. (a.k.a. COOPERATIVA DE SERVICIO DE TRANSPORTE DE CARGA MULTIMODAL DE COLOMIBA LTDA.; a.k.a. COOTRANSMULTI H.H. LTDA.), Calle 30 No. 10–50, Barranquilla, Colombia; Calle 35 No. 36–68, Barranquilla, Colombia; NIT # 802019665–0 (Colombia) [SDNT].

10. CORPORACION DE CONSULTORIA, ASESORIA, PRESTACION DE SERVICIOS Y DOTACION DE ELEMENTOS Y SUMINISTROS CIA. LIMITADA (a.k.a. CORDES CIA. LIMITADA; f.k.a. CORPORACION DE CONSULTORIA ASESORIA Y DOTACION DE ELEMENTOS Y SUMINISTROS CIA. LIMITADA), Calle 71C No. 4N–19, Cali, Colombia; NIT # 830502730–4 (Colombia) [SDNT].

11. CUMBRES SOLUCIONES INMOBILIARIAS S.A. DE C.V., Avenida Miguel Angel 18, Colonia Real Vallarta, Zapopan, Jalisco, Mexico; Calle del Menhir Sur 661–2, Colonia Altamira, Zapopan, Jalisco, Mexico [SDNT].

12. CURE SABAGH Y CIA. S.C.S., Calle 32 No. 43A–89, Barranquilla, Colombia; NIT # 802000463–6 (Colombia) [SDNT].

13. DESARROLLO GEMMA CORPORATION, Calle 52 Bella Vista, Chalet # 17, Panama City, Panama; RUC # 25544701403775 (Panama) [SDNT].

14. FISHING ENTERPRISE HOLDING, INC., Avenida Samuel Lewis, Edificio Comosa, Piso 16, Panama City, Panama; RUC # 2120741397076 (Panama) [SDNT].

15. FUDIA LTDA., Calle 111 No. 36B–17, Barranquilla, Colombia; NIT # 800230555–4 (Colombia) [SDNT].

16. GERENCIA DE PROYECTOS Y SOLUCIONES LTDA., Avenida 13 No. 100–12 Ofc. 302, Bogota, Colombia; NIT # 800231600–2 (Colombia) [SDNT].

17. GIMNASIO BODY AND HEALTH, Calle 80 No. 75–210, Barranquilla, Colombia [SDNT].

18. HODWALKER Y LEAL Y CIA. S.C.A., Via 40 No. 67–20/42, Barranquilla, Colombia; NIT # 900074434–5 (Colombia) [SDNT].

19. HOTEL LA CASCADA S.A. (f.k.a. CENTRO RECREACIONAL LA CASCADA LTDA.), Carrera 12 Avenida 25 Esquina, Girardot, Colombia; NIT # 890601336–8 (Colombia) [SDNT].

20. INMOBILIUM INVESTMENT CORP., Avenida Frederico Boyd y Calle 51, Edificio Torre Universal, Piso 3, Panama City, Panama; RUC # 4055231267286 (Panama) [SDNT].

21. INTERNACIONAL DE PROYECTOS INMOBILIARIA IPI S.A. (a.k.a. IPI S.A.), Avenida Pedro Vicente Maldonado 744, Edificio Centro Comercial El Recreo, Local 24I, Pichincha, Quito, Ecuador; RUC # 1791843436001 (Ecuador) [SDNT].

22. INVERSIONES AGROPECUARIA ARIZONA LTDA., Calle 82 No. 43–21 Ofc. 1C, Barranquilla, Colombia; NIT # 802019694–4 (Colombia) [SDNT].

23. INVERSIONES MPS S.A. (f.k.a. EQUIPOS MPS S.A.), Avenida 13 No. 100–12 Ofc. 302, Bogota, Colombia; NIT # 800231392–5 (Colombia) [SDNT].

24. LAVADERO EL CASTILLO, Carrera 84 No. 32B–40, Medellin, Colombia [SDNT].

25. LIZZY MUNDO INTERIOR, Justo Sierra 1963, Guadalajara, Jalisco, Mexico [SDNT].

26. MARTIN HODWALKER M. & CIA. S. EN C. (a.k.a. MARTIN HODWALKER M. AND CIA. S. EN C.; n.k.a. VERANILLO S.A.; f.k.a. VERANILLO Y CIA. S. EN C.), Via 40 No. 67–20/42, Barranquilla, Colombia; NIT # 802007314–9 (Colombia) [SDNT].

27. MC OVERSEAS TRADING COMPANY SA DE CV, Justo Sierra 1963, Guadalajara, Jalisco, Mexico [SDNT].

28. ORIMAR LTDA., Carrera 19 No. 57–33, Bogota, Colombia; NIT # 801076804–7 (Colombia) [SDNT].

29. OVERSEAS TRADING COMPANY (a.k.a. ''DURATEX GUATEMALA''; a.k.a. ''DURATEX S.A.''), 7A Avenida 9–15, Zona 12 Colonia La Reformita, Guatemala City, Guatemala; Barrio del Monte 1 Avenida 2–51, Zona 1 Colonia ViCanales No. 4, Guatemala City, Guatemala; 20 Calle 20–81 Zona 10, Guatemala City, Guatemala; NIT # 2500971–0 (Guatemala) [SDNT].

30. PROYECTOS Y SOLUCIONES INMOBILIARIA LTDA. (f.k.a. PROMOTORA DE PROYECTOS Y SOLUCIONES LTDA.), Avenida 13 No. 100–12 Ofc. 302, Bogota, Colombia; NIT # 800014349–8 (Colombia) [SDNT].

31. ROCK FISH IMPORT EXPORT E.U., Avenida Juan XXIII, San Andres, Colombia; NIT # 827000913–1 (Colombia) [SDNT].

32. TRANSPORTES MICHAEL LTDA. (a.k.a. TRANSMIKE LTDA.), Calle 30 No. 10–50, Barranquilla, Colombia; Sitio Nuevo, Magdalena, Colombia; NIT # 802024118–3 (Colombia) [SDNT].

33. VERANILLO DIVE CENTER LTDA. (a.k.a. CLUB DE PESCA VERANILLO), Via 40 No. 67–42, Barranquilla, Colombia; NIT # 802008393–5 (Colombia) [SDNT].

34. YAMAHA VERANILLO DISTRIBUIDORES, Via 40 No. 67–42, Barranquilla, Colombia [SDNT].

Dated: December 21, 2023.

Gregory T. Gatjanis,

Associate Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–28583 Filed 12–27–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On December 8, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

Individuals

1. ANDRE, Johnson (Latin: ANDRÉ, Johnson) (a.k.a. "IZO"; a.k.a. "IZO 5 SECONDS"; a.k.a. "IZO 5 SEGONN"; a.k.a. "IZO VILAJ DE DYE"), Village de Dieu, Martissant, Port-au-Prince, Haiti; DOB 1997; POB Haiti; nationality Haiti; citizen Haiti; Gender Male (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(A) of Executive Order 13818 of December 20, 2017, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," 82 FR 60839 (Dec. 26, 2017) (E.O. 13818) for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse and pursuant to section 1(a)(ii)(C)(1) for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

2. DESTINA, Renel (a.k.a. "TI LAPLI"; a.k.a. "TILAPLI"), Haiti; DOB 11 Jun 1982; POB Haiti; nationality Haiti; Gender Male (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse and pursuant to section 1(a)(ii)(C)(1) for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

3. INNOCENT, Vitel'homme (a.k.a. INNOCENT, Vitel Homme; a.k.a. INNOCENT, Vitelhomme; a.k.a. VITEL'HOMME, Innocent; a.k.a. "VITEL HOMME"), Port-au-Prince, Haiti; DOB 08 Nov 1985 to 07 Nov 1986; nationality Haiti; Gender Male (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse and pursuant to section 1(a)(ii)(C)(1) for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

4. JOSEPH, Wilson (a.k.a. "BEENIE"; a.k.a. "BIG CHIEF"; a.k.a. "LAMO SANJOU"; a.k.a. "LANMO SAN JOU" (Latin: "LANMÒ SAN JOU"); a.k.a. "LANMOU100JOU"; a.k.a. "WILSON, Joseph"), Port-au-Prince, Haiti; DOB 28 Feb 1993; POB Lascahobas, Central Department, Haiti; nationality Haiti; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse and pursuant to section 1(a)(ii)(C)(1) for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

5. KOIJEE, Jefferson (a.k.a. KOIJEE, Jefferson Tamba), 21 Street Sinkor, Monrovia, Liberia; DOB 07 Sep 1985; POB Monrovia, Liberia; nationality Liberia; Gender Male; Passport DP0003662 (Liberia) issued 27 Jan 2023 expires 27 Jan 2025 (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or who has directly or indirectly engaged in, serious human rights abuse and pursuant to section 1(a)(ii)(B)(1) for being a foreign person who is a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirect engaged in corruption, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery.

6. HU, Lianhe (Chinese Simplified: 胡联合), China; DOB 04 Oct 1967; POB Shaoyang, Hunan, China; nationality China; Gender Male (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

7. BYABASHAIJA, Johnson (a.k.a. BYABASAIJA, Johnson Christopher; a.k.a. BYABASHAIJA, Johnson Omuhunde Rwashote), Kampala, Uganda; DOB 27 Sep 1957; POB Kajure, Rukungiri District, Uganda; nationality Uganda; Gender Male (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

8. HANAFI, Khalid (a.k.a. HANAFI, Mohammad Khalid; a.k.a. HANAFI, Shaikh al-Hadith Mohammad Khalid; a.k.a. HANAFI, Shaykh Muhammad Khalid; a.k.a. "KHALID, Mohamad"), Afghanistan; DOB 1971 to 1972; POB Kolam Shaheed, Doabi, Nuristan, Afghanistan; nationality Afghanistan; Gender Male (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

9. MAHMOOD, Fariduddin (a.k.a. MAHMOOD, Maulvi Fariduddin; a.k.a. MAHMOUD, Sheikh Farid-ud-Den; a.k.a. MAHMUD, Mawlawi Fariduddin), Afghanistan; DOB 1952; POB Sharana, Paktika Province, Afghanistan; nationality Afghanistan; Gender Male (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

10. GAO, Qi (Chinese Simplified: 高琪), China; DOB Aug 1970; POB Linxian County, Shanxi Province, China; nationality China; Gender Male (individual) [GLOMAG] [UHRPA] (Linked To: XINJIANG PUBLIC SECURITY BUREAU).

    Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure and sanctioned pursuant to section 6(b) of the Uyghur Human Rights Policy Act of 2020 (Public Law 116-145), as amended by Public Law 117-78 (as amended, UHRPA), for being a person identified in the report required under section 6(a)(1) of UHRPA as a foreign person, including any official of the Government of the People's Republic of China, who is responsible for any of the following with respect to Uyghurs, ethnic Kazakhs, Kyrgyz, members of other Muslim minority groups, or other persons in Xinjiang Uyghur Autonomous Region: torture; cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges and trial; causing the disappearance of persons by the abduction and clandestine detention of those persons; other flagrant denial of the right to life, liberty, or the security of persons; or serious human rights abuses in connection with forced labor.

Dated: December 8, 2023

Bradley Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–28591 Filed 12–27–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Open Meeting of the Advisory Committee on Risk-Sharing Mechanisms

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of open meeting.

SUMMARY: This notice announces that the U.S. Department of the Treasury's Advisory Committee on Risk-Sharing Mechanisms (ACRSM) will meet in the Cash Room, 1500 Pennsylvania Avenue NW, Washington, DC 20220, from 2 p.m.–4 p.m. eastern time, February 1, 2024. The Committee meeting will be held in person and virtually and is open to the public.

DATES: Thursday, February 1, from 2 p.m.–4 p.m. eastern time.

ADDRESSES: The Committee meeting will be held in the Cash Room, Department of the Treasury, 1500 Pennsylvania Ave. NW, Washington, DC 20220 and via teleconference. The meeting will be open to the public. Because the meeting will be held in a secured facility, members of the public who plan to attend the meeting must register online. Attendees may visit: *https://events.treasury.gov/s/* and fill out a secure online registration form. A valid email address will be required to complete online registration. (Note: online registration will close on January 25th or when capacity is reached.)

A link to the webcast will be available through the Committee's website at: *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/terrorism-risk-insurance-program/advisory-committee-on-risk-sharing-mechanisms-acrsm*. Requests for reasonable accommodations under section 504 of the Rehabilitation Act should be directed to Snider Page, Office of Civil Rights and Equal Employment Opportunity, Department of the Treasury at (202) 622–0341, or *snider.page@treasury.gov*.

FOR FURTHER INFORMATION CONTACT: Annette Burris, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220, at (202) 622–2541. Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with the Federal Advisory Committee Act, 5 U.S.C. 1001 *et seq.,* through implementing regulations at 41 CFR 102–3.150.

Public Comment: Members of the public wishing to comment on the business of the ACRSM are invited to submit written statements by any of the following methods:

Electronic Statements

- Send electronic comments to *acrsm@treasury.gov*.

Paper Statements

- Send paper statements in triplicate to the Advisory Committee on Risk-Sharing Mechanisms, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220.

In general, the U.S. Department of the Treasury will post all statements on its website *https://www.treasury.gov/initiatives/fio/acrsm/Pages/default.aspx* without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. The U.S. Department of the Treasury will also make such statements available for public inspection and copying in the U.S. Department of the Treasury's Library, 720 Madison Place NW, Room 1020, Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. eastern time. You can make an appointment to inspect statements by telephoning (202) 622–2000. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

Background: The ACRSM provides advice and recommendations to the Federal Insurance Office (FIO) with respect to (1) the creation and development of non-governmental, private market risk-sharing mechanisms for protection against losses arising from acts of terrorism, and (2) FIO's administration of the Terrorism Risk Insurance Program (TRIP).

Tentative Agenda/Topics for Discussion: This will be the first ACRSM meeting of 2024. In this meeting, the ACRSM will address, consistent with its charter's mandate, topics related to the role of nongovernmental mechanisms in supporting the terrorism risk insurance market. Specifically, the ACRSM will hear presentations addressing (1) FIO's work related to consideration of whether a potential federal insurance response to catastrophic cyber loss to U.S. critical infrastructure is warranted, and its implications for TRIP; (2) a panel discussion of major cyber modeling firms on the current state of cyber modeling, including the modeling of catastrophic events and the potential impact of such events upon TRIP; and (3) a presentation from an insurance rating agency on how it evaluates cyber insurance risk in its considerations, and how the existence of programs such as TRIP factor into that evaluation. The Committee will then discuss suggested areas for the ACRSM's focus moving forward relating to private market risk sharing against losses arising from acts of terrorism and the administration of TRIP.

Steven E. Seitz,

Director, Federal Insurance Office.

[FR Doc. 2023–28657 Filed 12–27–23; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0648]

Agency Information Collection Activity Under OMB Review: Foreign Medical Program (FMP) Registration Form and Claim Cover Sheet

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Refer to ''OMB Control No. 2900–0648.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Avenue NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov*. Please refer to ''OMB Control No. 2900–0648'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–3521.

Title: Foreign Medical Program (FMP) Registration Form and Claim Cover Sheet, VA Forms 10–7959f-1 and 10–7959f-2.

OMB Control Number: 2900–0648.

Type of Review: Extension of a currently approved collection.

Abstract: The Foreign Medical Program (FMP) is a federal health benefits program for Veterans, which is administered by the Department of Veterans Affairs (VA) Veterans Health Administration (VHA). The FMP is a Fee for Service (indemnity plan) program and provides reimbursement for VA adjudicated service-connected conditions. Title 38 CFR 17.35 states that VA will provide coverage for the Veteran's service-connected disability when the Veteran is residing or traveling overseas. Title 38 CFR 17.125(c) states that requests for consideration of claim reimbursement from approved health care providers and Veterans are to be mailed to VHA Health Administration Center.

VA currently collects information for FMP reimbursement through an OMB approved collection under 2900–0648, using VA Form 10–7959f-1, Foreign Medical Program (FMP) Registration Form, and VA Form 10–7959f-2, Foreign Medical Program (FMP) Claim Cover Sheet. This collection of information is necessary to continue to reimburse Veterans or providers under the FMP.

a. VA Form 10–7959f-1 will collect information used to register into the FMP those Veterans with service-connected disabilities who are living or traveling overseas.

b. VA Form 10–7959f-2 will collect information to streamline the FMP claims submission process for claimants or providers, while also reducing the time spent by VA on processing FMP claims. The cover sheet will explain to foreign providers and Veterans the basic information required for the processing and payment of claims.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 88 FR 203 on October 23, 2023, page 72823.

VA Form 10–7959f-1

Affected Public: Individuals or Households.

Estimated Annual Burden: 111 hours.

Estimated Average Burden Per Respondent: 4 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 1,660.

VA Form 10–7959f-2

Affected Public: Individuals or Households; Private Sector.

Estimated Annual Burden: 3,652 hours.

Estimated Average Burden Per Respondent: 11 minutes.

Frequency of Response: 12 times annually.

Estimated Number of Respondents: 1,660.

By direction of the Secretary.

Dorothy Glasgow,

VA PRA Clearance Officer, (Alt) Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–28647 Filed 12–27–23; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of the Treasury

Office of the Comptroller of the Currency
Federal Reserve System
Federal Deposit Insurance Corporation
National Credit Union Administration

12 CFR Parts 3, 4, 6, et al.
Rules of Practice and Procedure; Final Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 3, 4, 6, 19, 108, 109, 112, 150, and 165

[Docket ID OCC–2021–0007]

RIN 1557–AE33

FEDERAL RESERVE SYSTEM

12 CFR Parts 238 and 263

[Docket No. R–1766]

RIN 7100–AG26

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

RIN 3064–AF10

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

[NCUA 2021–0079]

RIN 3133–AF37

Rules of Practice and Procedure

AGENCY: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; National Credit Union Administration.

ACTION: Final rule.

SUMMARY: The Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) (collectively, the Agencies) are adopting final changes to the Uniform Rules of Practice and Procedure (Uniform Rules) to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. The OCC, Board, and FDIC are also modifying their agency-specific rules of administrative practice and procedure (Local Rules). The OCC also is integrating its Uniform Rules and Local Rules so that one set of rules applies to both national banks and Federal savings associations and amending its rules on organization and functions to address service of process.

DATES: The rule is effective on April 1, 2024.

FOR FURTHER INFORMATION CONTACT: *OCC:* MaryAnn Nash, Counsel, and Heidi Thomas, Senior Counsel, Chief Counsel's Office, (202) 649–5490. *If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services. Board:* David Williams, Associate General Counsel, *david.williams@frb.gov,* (202) 452–3973, and Héctor G. Bladuell, Senior Counsel, Legal Division, *hector.g.bladuell@frb.gov,* (202) 452–2491. *FDIC:* Heather M. Walters, Counsel, Legal Division, *hewalters@fdic.gov* (202) 898–6729; and Michael P. Farrell, Counsel, Legal Division, *mfarrell@fdic.gov,* (703) 340–9201. *NCUA:* Damon P. Frank, Senior Trial Attorney, and John H. Brolin, Senior Staff Attorney, Office of General Counsel, at (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. Background

Section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Public Law 101–73, 103 Stat. 183 (1989), required the Agencies, together with the Office of Thrift Supervision (OTS), to develop uniform rules and procedures for administrative hearings. In August 1991, the Agencies and OTS each adopted final Uniform Rules as well as Local Rules specific to each agency.[1] Based on the experience gained in administrative hearings, the Agencies, together with OTS, modified the Uniform Rules and Local Rules in 1996.[2]

The Uniform Rules and Local Rules have remained largely unchanged since the 1996 amendments, while the practice of administrative hearings has changed fundamentally with the introduction of electronic communication and transmission. The current Uniform Rules were promulgated at a time when the Agencies accepted only paper pleadings. However, beginning in 2005, the Office of Financial Institution Adjudication (OFIA) established a dedicated electronic mailbox to accept electronic pleadings and service and, by 2006, paper pleadings were virtually eliminated in administrative hearings. Without rules in place to address electronic pleadings, the Administrative Law Judges (ALJs) opted to dictate procedures pertaining to electronic filing and other items on an ad hoc basis in their scheduling orders.

The Agencies issued a proposed rule on April 13, 2022, to update and modernize the Uniform Rules as well as the Local Rules of the OCC, FDIC, NCUA, and the Board. The Agencies did not receive any substantive comments on the Uniform Rules or the Agencies' Local Rules. Therefore, for the reasons stated in the preamble to the proposed rule, the Agencies are publishing the Uniform and Local Rules without substantive change.[3]

In this final rule,

- The Agencies are amending the Uniform Rules to recognize electronic pleadings and communications in administrative hearings and to reflect the experience of the Agencies in administrative litigation.
- The OCC and the NCUA are also removing from the Uniform Rules the remaining references to the OTS, which was abolished in 2011.[4]
- The OCC, Board, and FDIC are each amending certain sections of their Local Rules that they believe should be updated, improved, or clarified.
- The OCC is consolidating its Uniform and Local Rules by applying part 19 to both national bank- and Federal savings association-related proceedings and investigations; removing its separate enforcement-related rules for Federal savings associations, 12 CFR parts 108, 109, 112, and 165; and making corresponding technical changes to parts 3, 6, and 150.
- The OCC is amending 12 CFR part 4, subpart A, Organization and Functions, to add a new § 4.8 that addresses service of process.

II. Applicability Date

As indicated in the proposed rule, the amendments made by this final rule to the Uniform Rules as well as to certain provisions of the Agencies' Local Rules will apply to adjudicatory proceedings initiated on or after the effective date of this final rule, April 1, 2024. The Agencies' rules that were in effect prior to April 1, 2024, will continue to apply to adjudicatory proceedings initiated before April 1, 2024. This timing

[1] The Agencies, together with the OTS, issued a joint notice of proposed rulemaking on June 17, 1991 (56 FR 27790). Each agency issued a final rule on the following dates: OCC on August 9, 1991 (56 FR 38024); Board on August 9, 1991 (56 FR 38052); FDIC on August 9, 1991 (56 FR 37968); and NCUA on August 8, 1991 (56 FR 37767). The OTS, whose rules and procedures were transferred to the OCC, the Board, and the FDIC in 2011, published its rules on August 12, 1991 (56 FR 38317). The Agencies' rules are codified at 12 CFR part 19, subpart A (OCC); 12 CFR part 263, subpart A (Board); 12 CFR part 308, subpart A (FDIC); and 12 CFR part 747, subpart A (NCUA).

[2] 61 FR 20330, May 6, 1996.

[3] Although the proposed rule provided common rule text for the Uniform Rules and line amendments to the Local Rules, this final rule publishes each agency's rule as amended in full.

[4] The FDIC removed references to the OTS and updated its rules to include State savings associations by Final Rule on January 30, 2015 (80 FR 5009). The Board similarly removed references to the OTS from its definitions and updated its rules to include savings and loan holding companies on September 13, 2011 (76 FR 56603).

ensures that parties to Agency adjudicatory proceedings have adequate notice of the rules governing those proceedings.

For the OCC, § 19.0 provides that the rules of practice and procedure set forth in subparts A through D and H, I, J, L, M, N, P, and Q apply to adjudicatory proceedings initiated on or after the effective date of this final rule, April 1, 2024. Rules applicable to national banks, Federal savings associations, or Federal branches and agencies that were in effect prior to April 1, 2024, continue to apply to adjudicatory proceedings initiated before April 1, 2024, unless otherwise stipulated by the parties.

The OCC has made a few technical changes to its proposed transition provision. First, the OCC has moved this provision from proposed subpart R in part 19 to new § 19.0 so that information about applicability of the revised rules for practice and procedure is more prominently placed. Second, the OCC has changed the title of the provision from ''effective date'' to ''applicability date'' for accuracy. Third, the OCC has made some minor wording changes for internal consistency. Fourth, the OCC has included the text of part 19 as in effect the day before the final rule's effective date, April 1, 2024, as appendix A to part 19 so that parties may reference the rules that apply to proceedings initiated before April 1, 2024. Lastly, the OCC has amended the transition provision to permit parties to proceedings initiated before April 1, 2024, to stipulate that the revised rules apply to such proceedings so that they are able to take advantage of the updated provisions.

For the Board, the revised Uniform Rules and Local Rules in subpart B of part 263 apply only to adjudicatory proceedings initiated on or after the effective date of this final rule, April 1, 2024. The previous version of these rules, which are included in appendix A to part 263 of this final rule, are applicable to all adjudicatory proceedings initiated before April 1, 2024.

The FDIC included a new § 308.0 as a technical change to clarify the applicability date of the revised Uniform Rules set forth in subpart A. The newly revised Uniform Rules only apply to adjudicatory proceedings initiated on or after the effective date of this final rule, April 1, 2024. Any adjudicatory proceedings initiated before April 1, 2024, continue to be governed by the previous version of the Uniform Rules, which are included in appendix A to part 308 of this final rule.

The NCUA has added to its existing § 747.0, as a technical change, to make clear that the revised Uniform Rules apply to adjudicatory proceedings initiated on or after the effective date of this final rule, April 1, 2024.

III. Section-by-Section Discussion of Amendments to the Uniform Rules

Although the discussion of these amendments is arranged as for a common rule, the Agencies are adopting the amendments individually. The Agencies have codified the Uniform Rules as follows: 12 CFR part 19, subpart A (OCC); 12 CFR part 263, subpart A (Board); 12 CFR part 308, subpart A (FDIC); and 12 CFR part 747, subpart A (NCUA).

General Comments

The final rule replaces gender references such as ''him or her,'' ''his or her,'' and ''himself or herself'' with gender-neutral terminology, where appropriate. Consistent with **Federal Register** drafting guidelines,[5] the Agencies have replaced the word ''shall'' throughout the final rule with the terms ''must,'' ''will,'' or other appropriate language. Finally, the Agencies have replaced the term ''administrative law judge'' with the abbreviation ''ALJ'' for ''administrative law judge,'' as this abbreviation is commonly used and understood. These changes appear throughout the Uniform Rules and will not be discussed further in the individual sections.

Section ____.1 Scope

Section ____.1 lists the types of adjudicatory proceeding to which the Uniform Rules apply. The final rule updates the list of civil money penalty proceedings covered by the Uniform Rules described in § ____.1(e) to include section 5, section 9, and section 10 of the Home Owners' Loan Act (HOLA).[6] These sections of the HOLA are applicable to Federal savings associations now supervised by the OCC, State-chartered savings associations now supervised by the FDIC, and savings and loan holding companies supervised by the Board. The final rule also adds a reference to ''the former Office of Thrift Supervision'' in the OCC's § 19.1(e)(10) to clarify that the Uniform Rules will apply to civil money proceedings for violations of orders issued, written agreements executed, and conditions imposed in writing by OTS.

Section ____.2 Rules of Construction

Section ____.2 of the Uniform Rules sets forth the rules of construction for the Uniform Rules. The final rule amends this section to eliminate § ____.2(b), which provides that any use of masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate. The final rule replaces all gender references such as ''him or her,'' ''his or her,'' and ''himself or herself'' with gender-neutral terminology; thus, this provision is no longer necessary.

Section ____.3 Definitions

Section ____.3 of the Uniform Rules includes definitions applicable to the Uniform Rules and, unless otherwise specified, the Local Rules. The final rule now defines the term ''electronic signature'' because § ____.7 of the final rule provides that electronic signatures may be used to satisfy the good faith certification requirement. In their respective final rules, the Agencies have replaced the definition of violation in § ____.3 with a cross-reference to the identical definition in section 3(v) of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1813(v).[7] The final rule also eliminates legacy references to the Office of Thrift Supervision in the definition of ''OFIA'' and the definition of ''Uniform Rules.''

The definition of ''institution'' in the OCC's final rule now includes the term ''Federal savings association'' in order to make the Uniform Rules and the OCC's Local Rules in part 19 of title 12 applicable to Federal savings associations, which have been regulated by the OCC since 2011.[8]

The Board's final rule adds ''nonbank financial companies'' and ''financial market utilities'' designated by the Financial Stability Oversight Council to its definition of ''institution'' to clarify that the Uniform Rules are applicable to these entities, which are supervised by the Board pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[9] In addition, the Board's final rule clarifies that organizations operating under section 25A of the Federal Reserve Act, Federal and State ''branches,'' as well as

[5] National Archives, Federal Register Writing Resources for Federal Agencies: Drafting Legal Documents, *https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html.*

[6] The Board made these updates on September 13, 2011 (76 FR 56603).

[7] The NCUA included this updated definition of violation in the proposed rule and is adopting the same wording in the final rule. The discussion in the preamble to the proposed rule inadvertently omitted reference to the NCUA making this change along with the OCC, Board, and FDIC.

[8] As described elsewhere in this *Supplementary Information,* the OCC is removing its Uniform Rules and Local Rules applicable to Federal savings associations, parts 108, 109, 112, and 165 of title 12.

[9] Public Law 111–203, 124 Stat. 1376 (2010).

''agencies'' as defined in section 1(b) of the International Banking Act, and ''any other entity subject to the supervision of the Board,'' are included in its definition of ''institution.'' Finally, the Board's final rule replaces the word ''savings association'' with ''depository institution'' in 12 CFR 263(f)(6) to conform this language to the language in 12 U.S.C. 1818(b)(3).

Section ____.5 Authority of the Administrative Law Ludge (ALJ)

Section ____.5 of the Uniform Rules addresses the authority of the ALJ. The final rule amends § ____.5(b)(2) to add the term ''other orders'' to the list of specific orders an ALJ is authorized to issue, quash, or modify. This change clarifies that the authority of the ALJ to issue orders is not limited to subpoenas, subpoenas *duces tecum,* and protective orders and may include other types of orders that are not enumerated in this section. The final rule also amends § ____.5(b)(11) to change the term ''presiding officer'' to ''ALJ'' to avoid confusion and clarify that the ALJ has the powers necessary and appropriate to discharge the duties of this role.

Section ____.6 Appearance and Practice in Adjudicatory Proceedings

Section ____.6 of the Uniform Rules addresses appearance and practice in adjudicatory proceedings. The final rule amends § ____.6(a)(2) to state simply that an individual may appear on their own behalf. This change eliminates language that is duplicative and unnecessary to the meaning of the provision. The final rule also amends § ____.6(a)(3) to include a requirement that a notice of appearance include a written acknowledgment that the individual has reviewed and will comply with the Uniform Rules and Local Rules. This requirement ensures that representatives appearing in the proceeding are informed of the rules that govern the proceedings.

Section ____.7 Good Faith Certification

Section ____.7 of the Uniform Rules addresses the requirement for good faith certification for every filing or submission of record following the issuance of a notice. The final rule amends § ____.7(a) to require that the counsel of record, including an individual who acts as their own counsel, include a mailing address, an electronic mail address, and a telephone number with every certification. The final rule also amends this section to permit electronic signatures to satisfy the signature requirements of the certification. These changes conform the rules to the current practice of electronic filing.

Section ____.9 Ex Parte Communications

Section ____.9 of the Uniform Rules addresses *ex parte* communications in administrative proceedings. The final rule amends § ____.9(c) to clarify that upon the occurrence of *ex parte* communication, the ALJ or the Agency Head must determine whether any action in the form of sanctions should be taken concerning the *ex parte* communication. The final rule amends §__.9(e)(1) to better align it with section 5 of the Administrative Procedure Act, 5 U.S.C. 554(d). Specifically, the final rule adds language stating that the ALJ may not consult with a person or party on a fact in issue without giving all parties notice and an opportunity to participate and may not be responsible to or subject to the supervision or direction of an employee agent engaged in the performance of investigative or prosecuting functions for any of the Agencies. Finally, the final rule amends § ____.9(e)(2) to refer to administrative or judicial proceedings rather than public proceedings to better describe the type of proceedings subject to the rule.

Section ____.10 Filing of Papers

Section ____.10 of the Uniform Rules addresses the requirements for the filing of papers. The final rule amends and renumbers § ____.10(b) to remove an outdated section on rules governing transmission by electronic media and replace it with a section stating that filing may be accomplished by electronic mail or other electronic means designated by the Agency Head or the ALJ. The final rule amends §__.10(b) to eliminate references to specific carriers and names of mail delivery services and instead refer generally to same day courier services and overnight delivery services. The final rule amends § ____.10(c), which addresses the formal requirements as to papers filed, to require papers to include the mailing address, electronic mail address, and telephone number of the counsel or party making the filing. Finally, the final rule eliminates § ____.10(c)(4), which required the filing of an original and one copy of each filing and is no longer necessary, given that the vast majority of papers are filed electronically, consistent with current adjudicatory practice. The final rule retains the existing methods of filing by paper, such as personal service, same day courier, overnight delivery, and mail, with appropriate modifications of the descriptions of those methods to conform to current terminology and standards for delivery.

Section ____.11 Service of Papers

Section ____.11 of the Uniform Rules addresses the requirements for service of papers. The modifications to § ____.11 provide for electronic filing, where appropriate, and simplify and update the descriptions for other, non-electronic, means of filing. The final rule amends § ____.11(b) to add service by electronic mail or other electronic means as a method for serving papers, consistent with current practice. The final rule retains the existing methods of service by paper, such as personal service, same day courier, overnight delivery, and mail, and replaces references to specific carriers and delivery services with general references to same day courier service and overnight delivery service. The final rule also amends § ____.11(c)(1) to require that all papers required to be served by the Agency Head or the ALJ upon a party that has appeared in the proceeding will be served by electronic mail or other electronic means designated by the Agency Head or the ALJ. For parties that have not appeared in the proceeding in accordance with § ____.6, the final rule preserves the option for non-electronic methods of service and modifies the descriptions of some of those methods to conform to current terminology and standards for delivery. Finally, in § ____.11(d), the final rule generally retains the existing methods for the service of subpoenas with appropriate modifications to the descriptions of the methods to conform to current terminology and standards for delivery.

Section ____.12 Construction of Time Limits

Section ____.12 of the Uniform Rules addresses the construction of time limits. The final rule amends § ____.12(b), which addresses when papers are deemed to be filed or served, to provide that in the case of transmission by electronic mail or other electronic means, filing and service are deemed to be effective upon transmittal by the serving party. The final rule retains the existing times for non-electronic methods of filing and service and updates the descriptions of these methods to make them consistent with the updated descriptions in §§ ____.10 and ____.11. The final rule amends § ____.12(c), which addresses the calculation of time for service and filing of responsive papers, to provide that in the case of service by electronic mail or other electronic means, the time limits are calculated by adding one calendar

day to the prescribed period. Finally, the final rule provides for the addition of two calendar days, rather than one, in the case of service by overnight delivery service and retains the language providing for the addition of three calendar days for service made by mail.

Section ____.14 Witness Fees and Expenses

Section ____.14 of the Uniform Rules addresses witness fees and expenses in administrative proceedings. The final rule amends § ____.14 to clarify the general rule, in § ____.14(a), that all witnesses, including an expert witness who testifies at a deposition or hearing, will be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party. The final rule also adds language in § ____.14(b) to clarify that the Agencies are not required to pay witness fees and mileage for testimony by a party. The final rule retains the current language governing the timing of witness payments in a new § ____.14(c).

Section ____.15 Opportunity for Informal Settlement

Section ____.15 of the Uniform Rules addresses the rules and process for informal settlement once a proceeding has been initiated. The final rule revises this section to more plainly express the existing rule that an offer or proposal for informal settlement may only be made to Enforcement Counsel.

Section ____.18 Commencement of Proceeding and Contents of Notice

Section ____.18(a) of the Uniform Rules governs the commencement of administrative proceedings. The final rule amends § ____.18(a)(1)(ii) to provide that Enforcement Counsel serves the notice upon the respondent to begin proceedings.[10] The final rule also amends this section to provide that Enforcement Counsel may serve the notice upon counsel for the respondent, rather than the respondent, provided that counsel for the respondent has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent. By requiring counsel to confirm representation of a respondent, the Agencies hope to clarify when it is appropriate to serve notice on an individual who purports to represent the respondent. Finally, the final rule amends § ____.18(a)(1)(iii) to make it clear that Enforcement Counsel files the notice with OFIA.[11]

Section ____.18(b) of the Uniform Rules addresses the contents of the notice in administrative proceedings. The final rule amends § ____.18(b) to provide that notice pleading applies in administrative proceedings, meaning that a notice need only provide a short and plain statement of the claim(s) showing that the agency is entitled to relief. The final rule also makes a technical change to § ____.18(b)(2) to change the description from ''a statement of the matters of fact or law showing the [Agency] is entitled to relief'' to simply ''matters of fact or law showing that the [Agency] is entitled to relief.'' The Agencies believe the reference to ''a statement'' in this section has no substantive meaning and, thus, have removed it.

Section ____.19 Answer

Section ____.19 of the Uniform Rules sets out the requirements for an answer in an administrative proceeding. The final rule amends § ____.19(c)(2) to provide that if a respondent fails to request a hearing as required by law within the applicable time frame, the notice of assessment constitutes a final and unappealable order, in accordance with 12 U.S.C. 1818(i)(2)(E)(ii) and 12 U.S.C. 1786(k)(2)(E)(ii), without further action by the ALJ. In the past, there has been confusion about whether any additional action on the part of the ALJ is required in this situation, and this language clarifies that no further action is necessary.

Section ____.24 Scope of Document Discovery

Section ____.24 of the Uniform Rules addresses the scope of discovery in an administrative proceeding and § ____.24(a) addresses limitations on discovery. The final rule updates the definition of the term ''documents'' in § ____.24(a)(1) to include not only writings, drawings, graphs, charts, photographs, and recordings, but electronically stored information and data or data compilations stored in any medium from which information can be obtained. This expanded definition of the term ''document'' is necessary to account for the range of digital information now available. The final rule amends § ____.24(a)(3) to clarify that discovery by the use of either interrogatories or requests for admission is not permitted. The final rule moves the paragraph on relevance currently in § ____.24(b) to a new § ____.24(a)(4) because that provision functions as a limitation on discovery. The final rule amends § ____.24(c) to clarify the list of privileges applicable to otherwise discoverable documents. In addition to the attorney-client privilege and the work-product doctrine, the proposed language would also specifically identify the bank examination privilege and the law enforcement privilege and exclude those privileged documents from discovery. Finally, the final rule adds language to § ____.24(d) to provide that document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing. This language recognizes the role of the ALJ in establishing a schedule for discovery while also providing for discovery to be completed earlier in the hearing process.

Section ____.25 Request for Document Discovery From Parties

Section ____.25 of the Uniform Rules addresses requests for document discovery from parties in administrative proceedings. The final rule replaces the heading ''General rule'' with ''Document requests'' in § ____.25(a) to better identify the subject matter of the section. The final rule amends § ____.25(a) to add a paragraph (a)(1) stating that a party may serve on another party a request not only to produce discoverable documents but to permit the requesting party or its representative to inspect or copy discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. It has been the practice of parties in administrative proceedings to permit the inspection and copying of discoverable documents, and this language formalizes that practice. The final rule includes language to provide that a party responding to a request for inspection may produce copies of documents or electronically stored information instead of permitting inspection. In many cases, providing documents or electronically stored information directly is more efficient than permitting inspection, and this amendment preserves the right of a responding party to make that choice. The final rule includes a new paragraph (a)(2) to simplify the language that previously appeared in § ____.25(b) regarding the identification of documents to be produced and require that any request describe with reasonable particularity each item or category of items to be inspected and

[10] The FDIC has already made this change in its version of the Uniform Rules in connection with amendments that became effective on January 12, 2021.

[11] The NCUA is deleting from part 747 the reference to change-in-control proceedings under 12 U.S.C. 1817(j), which does not apply to credit unions or the NCUA. The NCUA is making the same deletion in § ____.33.

specify a reasonable time, place, and manner for the inspection or production.

The final rule amends the rules governing production or copying, as set out in a new § ____.25(b)(1), to require that, unless a particular form is specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories of the request, and produce electronically stored information in a form in which it is ordinarily maintained or in a reasonably usable form. The Agencies recognize that the ways in which electronically stored information may be stored and transmitted may change over time and are adopting the reasonably usable standard for electronically stored information to provide flexibility.

The final rule simplifies the rules associated with the costs of document production in a new § ____.25(b)(2), which requires the producing party to pay its own costs to respond to a discovery request unless otherwise agreed by the parties. This language eliminates the earlier requirement that a requesting party prepay the producing party for certain costs while also allowing the parties to agree to share costs, as appropriate in a particular case.

The final rule modifies the time limits for motions to limit discovery in § ____.25(d). In § ____.25(d)(1), the final rule extends the time limit for a party to object to a discovery request from within ten to within 20 days of being served with such a request. In § ____.25(d)(2), the final rule extends the time limit for a party to file a written response from within five to within ten days of service of the motion. Additional time allows the parties to digest such requests and engage with each other to narrow the scope of the request before having to file a motion with the ALJ. The Agencies believe that parties making motions to limit discovery and responding to motions to limit discovery will benefit from additional time to review and respond to such requests.

Finally, the final rule amends § ____.25(e) to specify the available privileges that may be asserted in connection with a request for production. The section now includes attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government deliberative process privilege, other privileges of the Constitution, any applicable act of Congress, and other principles of common law as grounds for withholding documents.

Section ____.26 Document Subpoenas to Nonparties

Section ____.26 of the Uniform Rules addresses document subpoenas to third parties in administrative proceedings. The final rule amends § ____.26(b)(1) to provide that a person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. This amendment clarifies to whom the motion to quash should be directed.

Section ____.27 Deposition of Witness Unavailable for Hearing

Section ____.27 of the Uniform Rules addresses the deposition of witnesses unavailable for an administrative hearing. The final rule amends § ____.27(a)(2) to require that the application for a subpoena state the manner in which the deposition is to be taken, in addition to the time and place, and provide explicitly that a deposition may be taken by remote means. These changes modernize the rules and conform the rules to existing practice. The final rule simplifies § ____.27(a)(4) by eliminating unnecessary language related to where subpoenas may be served. In order to further provide for remote depositions, the final rule amends § ____. 27(c)(1) to provide that a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent, by stipulation of the parties or order by the ALJ. The final rule amends § ____.27(d) to clarify that if a subpoenaed person fails to comply with any subpoena issued pursuant to this section the aggrieved party may apply to the appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. Finally, the final rule replaces an inaccurate cross-reference to paragraph (c)(3) with a correct reference to paragraph (c)(2).

Section ____.29 Summary Disposition

Section ____.29 of the Uniform Rules addresses summary disposition. The final rule modifies § ____.29(c) to provide that a request for a hearing on a motion must be made in writing. The new language formalizes the process of requesting a hearing and increases the clarity of the process.

Section ____.31 Scheduling and Prehearing Conferences

Section ____.31 of the Uniform Rules addresses scheduling and prehearing conferences. The final rule amends § ____.31(a) to clarify that the prehearing conference must be set within 30 days of service of the notice or an order commencing a proceeding and eliminate the option in the current rule for the parties to agree on another time. The final rule also adds language to clarify that it is a schedule for discovery, and not actual discovery, that the parties may determine at the scheduling conference. Finally, the final rule eliminates references to ''telephone'' conferences in order to make the provision more technologically neutral.

Section ____.32 Prehearing Submissions

Section ____.32 of the Uniform Rules addresses prehearing submissions. The final rule amends § ____.32(a) to extend the time for a party to file prehearing submissions with the ALJ from 14 days to 20 days before the start of the hearing. This change will give the parties more flexibility in completing their filings. The final rule further amends § ____.32 to update the required prehearing submissions and § ____.32(a)(1) to require the submission of a prehearing statement that states the party's position with respect to the legal issues presented, the statutory and case law upon which the party relies, and the facts the party expects to prove at the hearing. The final rule amends § ____.32(a)(2) to require that the final list of witnesses include the name, mailing address, and electronic mail address for each witness and to clarify that the list of witnesses need not identify the exhibits to be relied upon by each witness at the hearing and that the list of exhibits should be a list of exhibits expected to be introduced at the hearing.

Section ____.35 Conduct of Hearings

Section ____.35 of the Uniform Rules addresses the conduct of administrative hearings. The final rule adds a new § ____.35(c) to provide rules governing electronic presentations in a hearing. The new language provides that the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If an ALJ requires an electronic presentation, each party will be responsible for their own presentation or related costs unless the parties agree to another manner in which to allocate responsibilities and costs. This new language accounts for electronic presentations that are not addressed in the existing rules but are used routinely in hearings.

Section ____.36 Evidence

Section ____.36 of the Uniform Rules sets forth the rules governing evidence in an adjudicatory proceeding. The final rule amends § ____.36(d)(2) to refer to ''direct questioning'' rather than ''direct interrogation'' of witnesses in order to clarify, in plain language, the meaning of this section.

IV. Section-by-Section Discussion of Amendments to the Local Rules of Each Agency

A. Amendments to OCC Local Rules

Part 19, subparts B through P, address local rules of practice and procedure specific to OCC investigations, hearings before the OCC, and other OCC-related proceedings involving national banks. The corresponding rules for Federal savings association-related proceedings and investigations, transferred from the former OTS to the OCC by the Dodd-Frank Act, are set forth at 12 CFR parts 108, 109, 112, and 165. Many of the national bank and Federal savings association-related provisions are similar, but in some cases no corresponding rule exists or one set of rules provides more specificity than the other. The final rule consolidates these rules by applying part 19 to both national bank- and Federal savings association-related proceedings and investigations and removes parts 108, 109, 112, and 165. The final rule also amends the Local Rules to add certain provisions of the Federal savings association rules that are not currently included in part 19 but that the OCC believes should apply to both Federal savings associations and national banks. In addition, the final rule reorganizes certain rules in part 19, including subparts D, E, F, and G relating to actions under the Federal securities laws; adds new provisions addressing the Equal Access to Justice Act (EAJA); and adds a new subpart Q addressing the forfeiture of a national bank, Federal savings association, or Federal branch and agency charter or franchise for certain money laundering or cash transaction offenses.

The amendments to the OCC's Local Rules are discussed below.

Subpart B—Procedural Rules for OCC Adjudications

19.100 Filing Documents

Current §§ 19.100 and 109.104(g) require that all filings with or referred to the Comptroller or ALJ in any proceeding under parts 19 or 109, respectively, be filed with the OCC Hearing Clerk. The two provisions are substantively the same except that § 19.100 provides a more detailed description of the types of filings to which the regulation applies. As a result of the final rule's application of part 19 to Federal savings associations and removal of part 109, § 19.100 applies to filings in Federal savings association-related proceedings as of the final rule's effective date, April 1, 2024. Furthermore, the final rule amends § 19.100 to remove the OCC filing street address and to require the filing to be made in a manner prescribed by § 19.10(b) and (c). Sections 19.10(b) and (c) prescribe the permissible filing methods and list form and content requirements for filing papers with the OCC. As amended by this final rule, filings are permitted by electronic mail or other electronic means designated by the Comptroller or the ALJ as of the final rule's effective date, April 1, 2024. Lastly, the final rule amends the current provision to clarify that the materials filed include any attachments or exhibits to the listed documents.

19.101 Delegation to OFIA

Both current §§ 19.101 and 109.101 provide that an ALJ at the Office of Financial Institution Adjudication (OFIA) will conduct actions brought under the respective subpart A rules. As a result of the final rule's application of part 19 to Federal savings associations, § 19.101 applies to adjudicatory actions brought against either national banks or Federal savings associations as of the final rule's effective date, April 1, 2024. The final rule makes one stylistic revision to § 19.101 to remove the passive sentence structure.

19.102 Civil Money Penalties

The final rule adds a new § 19.102 that incorporates parts of § 109.103(b), which provides rules for the payment of civil money penalties. The national bank rules currently do not address this topic with specificity, and the OCC has determined that these provisions, which clarify when parties must pay civil money payments, should apply to both national banks and Federal savings associations. As a result of this amendment, respondents are required to pay civil money penalties assessed pursuant to subpart A of part 19 within 60 days after the issuance of the notice of assessment, unless the OCC requires a different time for payment. If a respondent has made a timely request for a hearing to challenge the assessment of the penalty, the respondent is not required to pay the penalty until the OCC has issued a final order of assessment. In such instances, the respondent is required to pay the penalty within 60 days of service of the final order unless the OCC requires a different time for payment.

Subpart C—Removals, Suspensions, and Prohibitions When a Crime Is Charged or a Conviction Is Obtained

Current subpart C of part 19 includes the rules applicable in hearings brought against any institution-affiliated party [12] who the OCC has suspended or removed from office or prohibited from further participation in the affairs of a depository institution pursuant to section 8(g) of the FDIA (12 U.S.C. 1818(g)). Part 108 applies similar rules to officers, directors, or other persons participating in the conduct of the affairs of a Federal savings association, Federal savings association subsidiary, or affiliate service corporation, although part 108 differs slightly on certain procedural issues. As described below, the final rule amends subpart C to incorporate certain provisions of part 108 that are helpful to the OCC in these adjudicatory actions, specifically to apply amended subpart C to both national banks and Federal savings associations and remove part 108. Although part 108 does not use the term ''institution-affiliated party,'' the OCC believes that the scope of part 108 is similar in substance to this term as defined in § 19.3 by reference to the FDIA.

19.110 Scope

The final rule amends § 19.110 to include a definitions section for subpart C similar to the one for Federal savings associations in § 108.2 to enhance the understanding and application of the regulation and simplify the regulatory text. New § 19.110(b) defines ''petitioner'' to mean an individual who has filed a petition for informal hearing under subpart C; ''depository institution'' to mean any national bank, Federal savings association, or Federal

[12] ''Institution-affiliated party,'' as defined in current § 19.3 and in this final rule by reference to section 3(u) of the FDIA (12 U.S.C. 1813(u)), means: (1) any director, officer, employee, or controlling stockholder (other than a bank holding company or savings and loan holding company) of, or agent for, an insured depository institution; (2) any other person who has filed or is required to file a change-in-control notice with the appropriate Federal banking agency under 12 U.S.C. 1817(j); (3) any shareholder (other than a bank holding company or savings and loan holding company), consultant, joint venture partner, and any other person as determined by the appropriate Federal banking agency who participates in the conduct of the affairs of an insured depository institution; and (4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution.

branch of a foreign bank; and ''OCC Supervisory Office'' to mean the Senior Deputy Comptroller or Deputy Comptroller of the OCC department or office responsible for supervision of the depository institution, or, in the case of an individual no longer affiliated with a particular depository institution, the Deputy Comptroller for Special Supervision. Furthermore, the final rule labels the existing paragraph in § 19.110 as § 19.110(a), Scope, and retitles the section heading to account for the addition of definitions.

19.111 Suspension, Removal, or Prohibition

The final rule reorganizes § 19.111 into paragraphs; retitles the section heading, as well as the subpart, to clarify that it applies to institution-affiliated parties; and removes passive sentence structure. In newly designated § 19.111(a), the final rule corrects an omission in current § 19.111, which provides that the Comptroller may serve a notice of suspension or order of removal or prohibition pursuant to 12 U.S.C. 1818(g) on an institution-affiliated party and must serve a copy of this notice or order on the appropriate depository institution. Because 12 U.S.C. 1818(g) also provides for a notice of prohibition, the final rule adds a reference to this notice of prohibition to this paragraph. In addition, as in § 108.4, newly designated § 19.111(a) specifies the manner of service by the Comptroller, providing that the Comptroller serve the notice or order in the manner set forth in § 19.11, Service of papers. The final rule also moves the information regarding a request for a hearing by the institution-affiliated party to a separate § 19.111(b); adds the ability to send the hearing request by same day courier service or overnight delivery service, in addition to by certified mail or by personal service with a signed receipt as provided under the current rule; and adds the caveat that this submission rule applies unless instructed otherwise by the Comptroller. This revision also utilizes the newly defined term ''OCC Supervisory Office.''

In addition, the final rule includes in § 19.111(b)(2) a provision similar to § 108.5(b) that requires an institution-affiliated party in a request for a hearing to admit or deny each allegation, or state that they lack sufficient information to admit or deny each allegation, which has the effect of a denial. Section 19.111(b)(2) also provides that denials must fairly meet the substance of each allegation denied and that general denials are not permitted; when the institution-affiliated party denies part of an allegation, that part must be denied and the remainder specifically admitted; and any allegation in the notice or order which is not denied is deemed admitted for purposes of the proceeding. Furthermore, similar to § 108.5(c), § 19.111(b)(2) provides that the request must state with particularity how the institution-affiliated party intends to show that its continued service to or participation in the affairs of the institution would not pose a threat to the interests of the institution's depositors or impair public confidence in any institution. The OCC believes that adopting these provisions from the Federal savings association regulation will help narrow the issues to be contested and make § 19.111 more consistent with the adjudicatory rule in § 19.19.

Furthermore, the final rule adds the default provision included in § 108.8 to § 19.111, as new paragraph (c). Under this new paragraph, if the institution-affiliated party fails to timely file a petition for a hearing pursuant to § 19.111(b), fails to appear at a hearing either in person or by attorney, or fails to submit a written argument where oral argument has been waived pursuant to § 19.112(c), the notice of suspension or prohibition will remain in effect until the information, indictment, or complaint is finally disposed of and the order of removal or prohibition will remain in effect until terminated by the OCC. The OCC believes the application of this provision to national banks will clarify that there are consequences if a petitioner fails to appear or fails to answer.

19.112 Informal Hearing

The final rule makes a number of changes to § 19.112, which provides the procedures for informal suspension or removal hearings before the OCC involving an institution-affiliated party. In § 19.112(a), the final rule updates the name of the OCC's Enforcement and Compliance Division to OCC Enforcement. The final rule also removes the requirement in this paragraph that the OCC Supervisory Office notify the appropriate OCC District Counsel of the hearing, as this is an unnecessary step.

In § 19.112(c)(2), the final rule adds language to clarify that, when responding to a petitioner's submissions, the OCC serves other parties in the manner set forth in § 19.11(c).

In § 19.112(d), the final rule amends paragraph (d)(2), which provides that the informal hearing is not governed by formal rules of evidence, to clarify that these inapplicable formal rules of evidence include the Federal Rules of Evidence, as provided in § 19.36. The final rule also clarifies paragraph (d)(3)(i) by breaking up the first sentence into two sentences. As revised, paragraph (d)(3)(ii) provides that the presiding officer may require, instead of permit as in the current paragraph, a shorter time period in which the parties may request oral testimony or witnesses at a hearing, which is the more accurate action for a presiding officer. As in § 19.27(c), the final rule also amends § 19.112(d)(3)(ii) to provide that, by stipulation of the parties or by order of the presiding officer, a court reporter or other authorized person may administer the required oath to a witness remotely without being in the physical presence of the witness. This amendment updates the current oath requirement for witnesses to account for remote proceedings and conforms this provision to § 19.112(d)(4), which permits electronic presentations at the hearing. In § 19.112(d)(3)(iii), the final rule makes technical changes to the different actions a presiding officer may take related to a suspension or prohibition based on an indictment, information, or complaint and a removal or prohibition with respect to a conviction or pre-trial diversion program to better reflect 12 U.S.C. 1818(g). Throughout paragraph (d) the final rule makes technical corrections by replacing ''appointed OCC attorney'' with ''OCC.''

The final rule also adds a new paragraph (d)(4) to § 19.112 to provide rules governing electronic presentations in the course of a hearing. As in § 19.35(c), this provision provides that, based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation, each party will be responsible for its own presentation or related costs unless the parties agree to allocate presentation responsibilities and costs differently. This new language is necessary to account for the routine use of electronic presentations in hearings that existing rules do not address.

Throughout § 19.112, the final rule utilizes the newly defined term ''OCC Supervisory Office'' and removes passive sentence structure.

19.113 Recommended and Final Decisions

The final rule makes a number of changes to § 19.113, which provides the procedures for decisions by the presiding officer and the OCC. The final rule updates § 19.113(c) to permit the Comptroller to notify the petitioner of a

decision by electronic mail or other electronic means, if the petitioner consents, instead of by registered mail. The final rule also makes technical changes to paragraph (c) by replacing ''when'' with ''if'' in describing whether the petitioner has waived an oral hearing, replacing the ''must'' with ''will'' in describing the Comptroller's notification of the decision, and replacing the ''and'' with ''or'' in describing the actions that the Comptroller may affirm, terminate, or modify in its final decision. In § 19.113(d), the final rule clarifies that there could be more than one charge against an institution-affiliated party. In § 19.113(f), the final rule removes the passive sentence structure. Lastly, the final rule adds headings to each paragraph.

Subparts D Through G—Actions Under the Federal Securities Laws

Subparts D, E, F, and G of current part 19 set forth the procedures applicable to actions taken by the OCC with respect to banks pursuant to various provisions of the Federal securities laws, including the Securities Exchange Act of 1934 (Exchange Act). Specifically, subpart D addresses exemption hearings under section 12(h) of the Exchange Act, subpart E addresses disciplinary proceedings, subpart F addresses civil money penalties, and subpart G addresses cease and desist authority. Although these Federal securities laws also apply to Federal savings associations, there are no comparable provisions in OCC regulations for Federal savings associations. Instead, the former OTS relied on the authority granted under the Exchange Act for these actions rather than incorporating the authority into its rules and specified in § 109.100(c) that the Uniform Rules of Practice and Procedure in subpart A of part 109 applied to proceedings under the Exchange Act.

In the final rule, the OCC streamlines the regulation by combining subparts D, E, F, and G into one subpart D entitled ''Actions under the Federal Securities Laws'' and reserves subparts E, F, and G. The OCC also applies this revised subpart D to Federal savings associations, removes § 109.100(c), and makes other changes as described below.

19.120 Exemption Hearings Under Section 12(h) of the Securities Exchange Act of 1934

The final rule moves the provisions in current subpart D of part 19 to a new § 19.120. Current subpart D governs informal hearings by the Comptroller to determine, pursuant to authority in sections 12(h) and (i) of the Exchange Act (15 U.S.C. 78*l*(h) and (i)), whether to exempt an issuer or a class of issuers from the provisions of sections 12(g), 13, or 14 of the Exchange Act (15 U.S.C. 78*l*(g), 78m, or 78n) or whether to exempt any officer, director, or beneficial owner of securities of an issuer from section 16 of the Exchange Act (15 U.S.C. 78p). This subpart currently covers issuers that are banks whose securities are registered pursuant to section 12(g) of the Exchange Act (15 U.S.C. 78*l*(g)). In addition to applying this provision to issuers that are Federal savings associations, the OCC is making a number of other changes:

Specifically, the final rule clarifies that § 19.120(a) applies to national bank and Federal savings association issued securities that may be subject to registration in addition to those securities already registered. This change permits a national bank or Federal savings association to obtain an exemption from the OCC in advance of registering.

The final rule also provides that when an applicant provides a copy of its newspaper notice of an exemption hearing to its shareholders pursuant to § 19.120(c) it must do so in the same manner as is customary for shareholder communications, which could be through electronic means. This change will make it easier and less burdensome to comply with this notice requirement.

In addition, as in §§ 19.35(c) and 19.112(d)(4), the final rule adds § 19.120(d)(8), governing electronic presentations in the course of an Exchange Act-related hearing. This provision provides that, based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for its own presentation and related costs unless the parties agree to another manner by which to allocate presentation responsibilities and costs. As indicated above, this new language is necessary to account for the routine use of electronic presentations in hearings that the existing rule does not currently address. The final rule makes a conforming change in § 19.120(d)(6) to allow, by stipulation of the parties or by order of the presiding officer, a court reporter or other authorized person to administer the required oath to a witness remotely without being in the physical presence of the witness. Furthermore, the final rule clarifies in § 19.120(d)(9) that a transcript of the hearing may be provided by electronic means.

Lastly, the OCC is making technical changes to § 19.120. The final rule makes minor, non-substantive changes in provisions redesignated as paragraphs (b) and (c); removes passive sentence structure in text redesignated as paragraph (d)(9); allows for more than one applicant in provisions redesignated as paragraphs (d)(4) and (5) and (e); and changes references in this section to the ''Securities and Corporate Practices Division'' to ''Bank Advisory'' to reflect the reorganization of the OCC's Law Department.

19.121 Disciplinary Proceedings Involving the Federal Securities Laws

The final rule moves the provisions in current subpart E of part 19 to a new § 19.121. Current subpart E governs proceedings by the Comptroller to determine whether to take disciplinary actions against banks that are transfer agents, municipal securities dealers, government securities brokers, government securities dealers, or persons associated with or seeking to become associated with these institutions.[13] The final rule applies this section to Federal savings associations by defining ''bank'' to mean a national bank or Federal savings association, and, when referring to a government securities broker or government securities dealer, a Federal branch or agency of a foreign bank. In addition, the final rule defines ''transfer agent,'' ''municipal securities dealer,'' ''government securities broker,'' ''government securities dealer,'' and person associated with a person engaged in these activities or with a bank engaged in these activities by cross-referencing to definitions in the Exchange Act. The final rule also makes technical changes to terms used in this section to correlate them more closely with terms used in the Exchange Act, including the addition to the scope of § 19.121 of any person seeking to become associated with a government securities broker or government securities dealer.

Furthermore, the final rule removes the reference to the Comptroller's delegate in redesignated paragraph (a)(2). The definition of ''Comptroller'' in § 19.3, which applies to § 19.121, includes a person delegated to perform

[13] Pursuant to sections 3(a)(34)(G)(i) and 15C(c)(2)(A) of the Exchange Act (15 U.S.C. 78c(a)(34)(G)(i) and 78o–5(c)(2)(A)), the OCC also may take disciplinary actions against Federal branches and agencies of foreign banks that are government securities brokers or government securities dealers or persons associated with or seeking to become associated with these entities.

the functions of the Comptroller of the Currency. Therefore, this reference is unnecessary.

Lastly, the final rule replaces the term ''party'' with the more accurate term ''respondent'' in redesignated paragraphs (b)(1) and (c)(2).

19.122 Civil Money Penalty Authority Under Federal Securities Laws

The final rule moves the provisions in current subpart F of part 19 to a new § 19.122. Current subpart F governs proceedings by the Comptroller to determine whether to impose a civil money penalty against banks that are transfer agents, municipal securities dealers, government securities brokers, government securities dealers, or persons associated with or seeking to become associated with these institutions.[14] The final rule applies this provision to Federal savings associations by defining ''bank'' to mean a national bank or Federal savings association and, when referring to a government securities broker or government securities dealer, a Federal branch or agency of a foreign bank. The final rule also defines ''transfer agent,'' ''municipal securities dealer,'' ''government securities broker,'' ''government securities dealer,'' and person engaged in these activities or person associated with a bank engaged in these activities by cross-referencing to definitions in the Exchange Act. Lastly, as with § 19.121, the final rule makes other technical changes to terms used in this section to correlate them more closely with terms used in the Exchange Act, including the addition of persons seeking to become associated with a government securities broker or government securities dealer to the scope of this section.

19.123 Cease and Desist Authority

The final rule moves the provisions in current subpart G of part 19 to a new § 19.123 and applies these provisions to both national banks and Federal savings associations. Current subpart G governs proceedings by the Comptroller to determine whether to initiate cease-and-desist proceedings against a national bank for violations of sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act (15 U.S.C. 78*l,* 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p) or implementing regulations. The final rule also updates these provisions by adding violations enacted by, or rules or regulations enacted thereunder, the Sarbanes-Oxley Act in 2002, as amended,[15] specifically, sections 301 [16] (audit committees), 302 (corporate responsibility for financial reports), 303 (improper influence on conduct of audits), 304 (forfeiture of certain bonuses and profits), 306 (insider trades during pension fund blackout periods), 401(b) (accuracy of financial reports), 404 (management assessment of internal controls), 406 (code of ethics for senior financial officers), and 407 (disclosure of audit committee financial expert) [17] (15 U.S.C. 78j–1(m), 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265).

Subpart H—Change in Bank Control

The Change in Bank Control Act (CBCA), which added section 7(j) to the FDIA (12 U.S.C. 1817(j)) and which the OCC has implemented at 12 CFR 5.50, provides that no person may acquire control of an insured depository institution unless the appropriate Federal bank regulatory agency has been given prior written notice of the proposed acquisition. If, after investigating and soliciting comment on the proposed acquisition, the agency disapproves the acquisition, the agency must mail a written notification to the filer within three days of the decision. The filer may then request an agency hearing on the proposed acquisition within 10 days of receipt of the disapproval notice. The Uniform Rules in part 19, subpart A, and part 109, subpart A, apply to hearings for filers whose proposed acquisition of a national bank or Federal savings association, respectively, under the CBCA has been disapproved by the OCC. Current subpart H of part 19 provides additional hearing procedures for insured national banks. Section 5.50, which applies to both national banks and Federal savings associations, directs filers who wish to pursue a hearing for a disapproval decision to part 19, subpart H. However, subpart H refers only to national banks.

Because 12 CFR 5.50 applies to both national banks and Federal savings associations, the final rule amends subpart H by adding language that makes the subpart specifically applicable to Federal savings associations in addition to national banks. Furthermore, because 12 CFR 5.50 applies to both *insured and uninsured* institutions and refers all filers who have been disapproved under § 5.50 to the part 19 procedures, the final rule amends subpart H to make it also applicable to uninsured institutions. In addition, the final rule streamlines subpart H by removing a description of the CBCA disapproval process and instead cross-referencing to 12 CFR 5.50 in the scope of § 19.160 and removing current paragraph (a) in § 19.161, which contains provisions relating to disapproval notification that are duplicative of 12 CFR 5.50(f). The final rule also adds section headings to § 19.160 and revises the section heading in § 19.161.

Subpart I—Discovery Depositions and Subpoenas

Current subpart I of part 19 and § 109.102 address the rules applicable to discovery depositions and subpoenas relating to national banks and Federal savings associations, respectively. These provisions are substantively similar but have slightly different wording. The final rule applies part 19, subpart I, to Federal savings associations and removes § 109.102. The final rule also revises the phrase ''direct knowledge of matters that are non-privileged, relevant, and material to the proceeding'' to ''direct knowledge of matters that are non-privileged and of material relevance to the proceeding.'' This change clarifies that persons being deposed have information of material relevance to the proceeding and is consistent with the requirements for document discovery in current and revised § 19.24(b). Furthermore, the final rule amends paragraph (a) to specify that a party also may take a deposition of a hybrid fact-expert witness in addition to an expert and a person, including another party, who has direct knowledge of matters that meet the standards of the paragraph, labeled as a ''fact witness'' by this amendment. This amendment defines a hybrid fact-expert witness as a fact witness who also will provide relevant expert opinion testimony based on the witness' training and experience.

The final rule also adds paragraph (a)(1) to § 19.170 to require a party to produce an expert report for any testifying expert or hybrid fact-expert witness before the witness' deposition and that, unless otherwise provided by the ALJ, the party must produce such report at least 20 days prior to the deposition. This new provision ensures that a deposing party has the benefit of the expert report prior to the deposition of an expert or hybrid fact-expert witness and that the deposing party has sufficient time to review the report prior to the deposition. Furthermore, paragraph (a)(2) of § 19.170 provides that respondents, collectively, are limited to a combined total of five depositions from all fact witnesses and

[14] *Id.*

[15] Public Law 107–204, 116 Stat. 745 (2002).

[16] Adding section 10A(m) to the Exchange Act.

[17] 15 U.S.C. 78j–1(m), 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265.

hybrid fact-expert witnesses. This paragraph also provides that Enforcement Counsel has the same deposition limit. This limit in the number of depositions adds efficiencies to the discovery process and prevents deposition requests from delaying the completion of the proceeding. Lastly, § 19.170(a)(2) provides that a party is entitled to take a deposition of each expert witness designated by an opposing party, codifying the right of a party to depose the opposing party's designated expert witness.

The final rule amends § 19.170(b) to require that a deposition notice provide the manner for taking the deposition in addition to the time and place. The final rule also adds language to § 19.170(b) to indicate that a deposition notice may require the witness to be deposed at any place within a State, territory, or possession of the United States or the District of Columbia in which that witness resides or has a regular place of employment or such other convenient place as agreed by the noticing party and the witness. Paragraph (b) also permits the parties to stipulate, or the ALJ to order, that a deposition be taken by telephone or other remote means. The OCC believes these changes make it easier and perhaps less costly for parties to obtain, and witnesses to provide, depositions, thereby improving the fact-finding process.

In § 19.170(c), the final rule provides that a party may take depositions no later than 20 days before the scheduled hearing date, instead of 10 days as in the current rule, except with permission of the ALJ for good cause shown. Increasing this time before a hearing will allow all parties more time to prepare for the hearing.

As elsewhere in this rulemaking, the final rule amends § 19.170(d), Conduct of a deposition, to provide that, by stipulation of the parties or by order of the ALJ, a court reporter or other authorized person may administer the required oath to a deponent remotely without being in the physical presence of the deponent. This amendment updates the current oath requirement for witnesses to account for remote proceedings and conform this provision to § 19.170(b)(2), which allows depositions to be taken by telephone or other remote means.

The final rule updates § 19.170(e)(1)(i) to allow for the witness' testimony to be recorded by electronic means such as by a video recording device. The current rule only allows for recording by a stenotype machine and electronic sound recording device. This change reflects new technology and adds flexibility to the testimony process.

Lastly, the final rule makes a non-substantive change to the heading in paragraph § 19.170(a) and changes the heading of paragraph (g) from ''Fees'' to ''Expenses'' to describe more accurately the subject of the paragraph.

With respect to § 19.171, the final rule amends paragraph (a) to correct a cross-reference and conform the reference to a place located in the United States to that used elsewhere in part 19. The final rule also amends paragraph (b)(2), which requires the party serving a subpoena to file proof of service with the ALJ, to provide that this proof of service is not required if so ordered by the ALJ. The OCC is making this change because, in some OCC proceedings, the ALJ has indicated they did not wish to receive this proof of service. Finally, the final rule amends paragraph (c) to provide that any party, in addition to a person named in a subpoena, may file a motion to quash or modify the subpoena. This amendment ensures that a party has the right to seek to quash or modify a third-party deposition subpoena.

Subpart J—Formal Investigations

Current subpart J of part 19 and part 112 address formal investigations against national banks and Federal savings associations, respectively. The final rule amends subpart J to make it applicable to both national banks and Federal savings associations and removes part 112. Unlike the Federal savings association rule at § 112.7(b), subpart J does not include a provision specifically providing for motions to quash subpoenas. The OCC has determined that it is neither necessary nor appropriate to include this provision in subpart J because the recipient may challenge investigative subpoenas in Federal court. However, the final rule adds a new paragraph (c) to § 19.184 of subpart J that is similar to the Federal savings association rule at § 112.7(c). This new paragraph permits subpoenas that require the attendance and testimony of witnesses or the production of documents, including electronically stored information, to be served on any person or entity within any State, territory, or possession of the United States or the District of Columbia or as otherwise provided by law. This provision also subjects foreign nationals to subpoenas if service is made upon a duly authorized agent located in the United States or in accordance with international requirements for service of subpoenas. The existing rule for national banks is not clear on service of foreign nationals, and the adoption of specific language from the Federal savings association rule will eliminate the disputes that previously have arisen on this issue. Furthermore, the addition of language regarding international subpoena requirements codifies existing OCC practice.

The final rule makes further changes to subpart J. First, the final rule amends § 19.181, Confidentiality of formal investigations. Currently, this provision provides that information or documents obtained in the course of a formal investigation are confidential and may be disclosed only in accordance with the provisions of 12 CFR part 4. The final rule describes in more detail the information or documents that are confidential to better ensure the confidentiality of formal investigations. Specifically, amended § 19.181 states that the entire record of any formal investigative proceeding, including the resolution or order of the Comptroller authorizing or terminating the proceeding; all subpoenas issued by the OCC during the investigation; and all information, documents, and transcripts obtained by the OCC in the course of a formal investigation, are confidential and may be disclosed only in accordance with the provisions of part 4. The final rule also adds that this information may be disclosed pursuant to the OCC discovery obligations under subpart A of part 19.

Second, the final rule amends § 19.182, Order to conduct a formal investigation, to clarify the list of actions persons authorized to conduct an investigation may take. Currently, this section provides that these persons may, among other things, issue subpoenas *duces tecum,* administer oaths, and receive affirmations as to any matter under investigation by the Comptroller. The final rule adds that these authorized persons also may take or cause to be taken testimony under oath, issue subpoenas other than subpoenas *duces tecum,* and modify subpoenas. This amendment makes § 19.182 more consistent with the powers enumerated in the relevant underlying statutes, including 12 U.S.C. 1818(n) and 1820(c). The final rule also makes a technical correction to indicate that authorized persons may administer affirmations rather than receive affirmations. Section 19.182 also currently provides that, upon application and for good cause, the Comptroller may limit, modify, or withdraw the order at any stage of the proceedings. The final rule clarifies that the Comptroller may also terminate the order. Finally, the final rule amends § 19.182 to specifically indicate that the persons conducting the investigation are empowered by the Comptroller to do so.

Third, the final rule amends § 19.183, Rights of witnesses. Current paragraph (a) provides that any person who is compelled or requested to furnish testimony, documentary evidence, or other information with respect to any matter under formal investigation must, on request, be shown the order initiating the investigation. The final rule amends this provision to provide that such persons may not retain copies of the order without first receiving written approval of the OCC. This amendment ensures the confidentiality of the order.

Current § 19.183(b) provides that a person testifying in a formal investigation may be accompanied, represented, and advised by counsel, and indicates that this right to counsel means that the attorney may be present at all times while the person is testifying and that the attorney may, among other things, question the person briefly at the conclusion of the testimony to clarify answers and make summary notes during the testimony solely for use of the person testifying. The final rule amends this description of permissible attorney activities to provide that the attorney's questioning of the person may be on the record. This ensures a more complete formal record of the proceeding. In addition, the final rule provides that the notes taken by the attorney during testimony may be used solely in representing the person. This change allows the attorney to use these notes and not restrict use of the notes to the person testifying, thereby enabling the attorney to better represent their client.

Section 19.183(c) provides that any person who has given or will give testimony and counsel representing the person may be excluded from the proceedings during the taking of testimony of any other witness. The final rule amends this provision to specify that such person and counsel may be excluded during the testimony of any other person at the discretion of the OCC or the OCC's designated representative. Furthermore, the final rule provides that neither attorney(s) for the institution(s) affiliated with the testifying person nor attorneys for any other interested persons have any right to be present during the testimony of any person not personally represented by such attorney. These changes ensure the confidentiality and integrity of the proceeding by mitigating conflicts of interest and clarify that it is the OCC or OCC's designated representative who makes the decision on exclusion.

Current § 19.183(d) provides that any person who is compelled to give testimony is entitled to inspect any transcript that has been made of the testimony but may not obtain a copy if the Comptroller's representatives conducting the proceedings have cause to believe that the contents should not be disclosed pending completion of the investigation. The final rule removes the burden of proving ''cause'' included in this provision, as the OCC finds this unnecessary. The final rule also eliminates the language that limits the release of the transcript pending completion of the investigation because the reasons for not disclosing the transcript may persist beyond the conclusion of any pending investigation.

Current § 19.183(e) provides that any designated representative conducting an investigative proceeding must report to the Comptroller any instances where a person has been guilty of dilatory, obstructionist, or insubordinate conduct during the course of the proceeding or any other instance involving a violation of this part. As this paragraph does not pertain to rights of witnesses, and to make clear that this provision applies to all formal investigations covered by subpart J, the final rule redesignates this paragraph as a new § 19.185. The final rule also replaces the phrase ''has been guilty of'' with ''has engaged in'' in the redesignated paragraph because the phrase ''has been guilty of'' is unclear in the context of this provision. Furthermore, the OCC does not believe it is appropriate for a person to be found guilty of this behavior before the designated representative reports this person to the OCC. With this change, the OCC may investigate or take other action with respect to this individual to ensure the fairness and accuracy of the proceeding in a more timely manner. This change also conforms the scope of this provision with the scope of a similar provision, § 19.197, which involves the reporting of certain conduct of an individual practicing before the OCC.

Fourth, the final rule amends § 19.184, Service of subpoena and payment of witness expenses, by removing the specific language in paragraph (b) regarding the payment of witnesses and instead cross-referencing to the more detailed rule for witness payments contained in revised § 19.14, discussed previously.

Lastly, the final rule makes a number of technical changes to subpart J. Specifically, the final rule replaces references to ''the Comptroller'' with ''the OCC'' in § 19.183(b) and (d) and in redesignated § 19.185 and replaces the term ''representatives'' with ''designated representatives'' in § 19.183(d)'' to align the provisions more closely with the statute. The final rule also removes the references to the ''Comptroller's delegate'' in §§ 19.180 and 19.182 as the definition of ''Comptroller'' in § 19.3, which applies to subpart J, includes a person delegated to perform the functions of the Comptroller of the Currency. In addition, the final rule adds a reference to Federal branches and agencies in § 19.180 to more completely describe those entities that are subject to the OCC's examination authority. Finally, the final rule adds section headings to § 19.183.

Subpart K—Parties and Representational Practice Before the OCC; Standards of Conduct

Current subpart K of part 19 contains rules relating to parties and representational practice before the OCC. The final rule makes mostly technical changes to this subpart.

First, in § 19.190, Scope, the final rule makes a confirming change to a cross-reference to reflect this rulemaking's amendments to subpart D.

Second, the final rule amends the definition of ''practice before the OCC'' in § 19.191, Definitions. Currently, the OCC defines the term to include any matters connected with presentations to the OCC or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the OCC. The final rule clarifies this statement so that it applies to both written and oral presentations. Section 19.191 also provides that the term ''practice before the OCC'' does not include work prepared for a bank solely at its request for use in the ordinary course of its business. The final rule amends this statement so that it also includes work prepared for a Federal savings association and a Federal branch or agency of a foreign bank, and changes ''bank'' to ''national bank.'' These changes are part of the OCC's application of part 19 to Federal savings associations and the OCC's specific inclusion of Federal branches and agencies in part 19 to clarify the application of part 19 to all entities supervised by the OCC.

Third, the final rule amends § 19.194, Eligibility of attorneys and accountants to practice, by removing the phrase ''who is qualified to practice as an attorney'' in paragraph (a) and the phrase ''who is qualified to practice as a certified public accountant or public accountant'' in paragraph (b). Section 19.191 defines the terms ''attorney'' and ''accountant'' and these definitions reference qualification requirements. Therefore, these phrases are superfluous.

Fourth, the final rule amends § 19.196, Disreputable conduct, which provides a nonexclusive list of disreputable conduct for which an individual may be censured, debarred, or suspended from practice before the OCC. Paragraph (d) of this section includes on this list disbarment or suspension from practice as an attorney or as a certified public accountant or public accountant by any duly constituted authority of any State, possession, or commonwealth of the United States or the District of Columbia for the conviction of a felony or misdemeanor involving moral turpitude in matters relating to the supervisory responsibilities of the OCC, where the conviction has not been reversed on appeal. The final rule deletes the phrase ''in matters relating to the supervisory responsibilities of the OCC'' so as not to limit the felony or misdemeanor conviction to only OCC-related matters. The OCC believes that an individual engaged in any of the conduct listed in this section, whether or not related to OCC supervisory matters, should not practice before the OCC.

Fifth, the final rule replaces the reference to the OTS in § 19.196(g) with ''the former OTS,'' as the OTS no longer exists.

Sixth, the final rule amends § 19.197, which provides the standards and rules for initiating disciplinary proceedings. Paragraph (a) of this section provides that an individual, including any employee of the OCC, who has reason to believe that an individual practicing before the OCC in a representative capacity has engaged in any conduct that would serve as a basis for censure, suspension, or debarment under § 19.192 (such as contemptuous conduct, materially injuring or prejudicing another party, violating a law or order, or unduly delaying proceedings) may report this conduct to the OCC or a person delegated to receive this information by the Comptroller. The final rule broadens the application of this paragraph to conduct under all of subpart K, which includes incompetence (§ 19.195) and disreputable conduct (§ 19.196), instead of conduct only under § 19.192. The OCC believes that an individual found to be incompetent or to have engaged in disreputable conduct also should be subject to a disciplinary proceeding under this section.

Seventh, the final rule amends § 19.198, Conferences, to add the terms ''censure'' in paragraph (a) and ''debarment'' in paragraph (b) to correct missing references. The final rule also changes the heading on § 19.198(b) from ''Resignation or voluntary suspension'' to ''Voluntary suspension or debarment'' so that it more accurately reflects the subject of the paragraph.

Eighth, the final rule amends § 19.200(a), which provides that if the final order against the respondent is for debarment the individual may not practice before the OCC unless otherwise permitted to do so by the Comptroller, by clarifying that the Comptroller's permission to permit such practice is pursuant to § 19.201. Section 19.201 provides that the Comptroller may entertain a petition for reinstatement after the expiration of the time period designated in the order of debarment and that the Comptroller may grant reinstatement only if satisfied that the petitioner is likely to act in accordance with part 19 and if granting reinstatement would not be contrary to the public interest. Section 19.201 further provides that any request for reinstatement is limited to written submissions unless the Comptroller, in their discretion, affords the petitioner a hearing. The amendment merely confirms that a debarred respondent only may be reinstated pursuant to the process set forth in § 19.201. It makes no substantive change. The final rule also revises the heading of § 19.200 to reflect the order of topics covered by the section.

Ninth, the final rule removes the references to the ''Comptroller's delegate'' in §§ 19.197(b) and (c), 19.199, and 19.200(d) as the definition of ''Comptroller'' in § 19.3, which applies to subpart K, includes a person delegated to perform the functions of the Comptroller of the Currency.

Finally, the final rule makes several minor, nonsubstantive wording changes throughout subpart K. In § 19.192(c), the NPR instruction stated that the OCC would replace the phrase ''administrative law judge'' with ''ALJ'' in one instance. The final rule replaces that phrase each time it appears in that section.

Subpart L—Equal Access to Justice Act

In general, EAJA,[18] codified at 5 U.S.C. 504, authorizes the payment of attorney's fees and other expenses to eligible parties who prevail over the United States in certain adversary adjudications, absent a showing by the government that its position was substantially justified or that special circumstances make an EAJA award unjust. EAJA requires each agency to issue rules that establish uniform procedures for the submission and consideration of applications for an EAJA award.[19] The OCC currently meets this requirement in subpart L of part 19, which provides that EAJA implementing regulations promulgated by the U.S. Department of the Treasury (Treasury), set forth at 31 CFR part 6, are applicable to formal adjudicatory proceedings under part 19. The final rule deletes the cross-reference to the Treasury regulation and amends subpart L to set forth EAJA regulations specifically applicable to certain OCC adversary adjudications conducted under part 19.

The OCC has based subpart L on the revised model rule implementing EAJA published in 2019 by the Administrative Conference of the United States (ACUS) (ACUS Model Rule).[20] As discussed below, the OCC has customized subpart L in certain places to reflect the OCC's procedures in adversary adjudications, reorganized a few provisions included in the ACUS Model Rule, made other changes based on the Treasury EAJA rule as well as the EAJA rules of the Board and FDIC,[21] and made non-substantive grammatical or stylistic changes. Although the Treasury, Board, and FDIC EAJA rules are based on earlier versions of the ACUS Model Rule, the OCC believes that these provisions remain useful and clarify the application of EAJA to OCC adversary proceedings.

Authority and Scope; Waiver

Section 19.205 describes the general purpose and scope of EAJA. Specifically, an eligible party may receive an award of attorney fees and other expenses when it prevails over an agency in certain administrative proceedings (adversary adjudications) unless the agency's position was substantially justified or special circumstances make an award unjust. Furthermore, as provided in the Treasury regulations, and as determined

[18] Public Law 96–481, title II, sec. 203(a)(1), (c) (1980), revived and amended Public Law 99–80, sec. 1, 6 (1985).

[19] 5 U.S.C. 504(c)(1). EAJA also requires that each agency issue its EAJA rule after consultation with the Chairman of ACUS. 5 U.S.C. 504(c)(1). Pursuant to instructions provided by ACUS in the preamble to the ACUS Model Rule, *see* 84 FR 38934, the OCC notified the Office of the Chairman of ACUS of the proposed rule. ACUS did not suggest any changes to the OCC's proposal.

[20] 84 FR 38934 (Aug. 18, 2019). ACUS originally issued an EAJA model rule in 1981 (46 FR 32900 (June 25, 1981)) and previously revised its model rule in 1986 (51 FR 16659 (May 6, 1986) (previously codified at 1 CFR part 315)). ACUS issued its model rule to assist agencies when adopting their EAJA rules and encourages agencies to set out and implement this model rule as part of their own EAJA rules. *Id.* The Treasury EAJA rule is based on the 1981 EAJA model rule.

[21] 12 CFR part 263, subpart G (Board) and 12 CFR part 308, subpart P (FDIC). Both the Board and FDIC EAJA rules are based on the earlier versions of the ACUS model rule.

by EAJA caselaw, this provision provides that no presumption under this subpart arises that the agency's position was not substantially justified because the agency did not prevail.[22]

The final rule does not contain the provision in the ACUS Model Rule that permits an eligible party, even if not a prevailing party, to receive an award under EAJA when it successfully defends against an excessive demand made by the agency. Although EAJA permits excessive demand awards, EAJA specifically provides that excessive demand awards be paid ''only as a consequence of appropriations provided in advance.'' [23] Because the OCC is not an appropriated agency and instead receives its funding through assessments on the institutions it regulates, the OCC believes that this EAJA excessive demand provision does not apply to the OCC. Consequently, the final rule does not include provisions in the ACUS Model Rule specifically related to excessive demand awards.

As provided in § 19.205(b), the OCC has determined that proceedings listed in §§ 19.1, 19.110, 19.120, 19.190, 19.230, and 19.241 meet EAJA's definition of ''adjudicatory adjudications'' and are covered by subpart L.

Section 19.205(c) provides that after reasonable notice to the parties, the presiding officer or the OCC may waive, for good cause shown, any provision contained in subpart L as long as the waiver is consistent with the terms and purpose of EAJA. Although this provision is not included in the ACUS Model Rule, the OCC finds that this provision provides useful discretion to the presiding officer and the OCC, as relevant, during the EAJA process and provides for the smoother conduct of EAJA proceedings should Congress subsequently amend EAJA and the OCC has not yet updated its corresponding EAJA implementing regulations.

Definitions

Section 19.206 sets forth definitions of terms used in this subpart. Unless otherwise noted, these definitions are substantively identical to the definitions in the ACUS Model Rule and based on the definitions in EAJA.

Section 19.206(a) defines ''adversary adjudication'' to mean an adjudication under 5 U.S.C. 554 in which the position of the OCC is represented by Enforcement Counsel.[24] With certain exceptions, section 554 applies to adjudications required by statute to be determined on the record after opportunity for an agency hearing.[25] Unlike EAJA and the ACUS Model Rule, the final rule does not specifically exclude from this definition adjudications related to setting rates, licensing decisions, contract appeals, and the Religious Freedom Restoration Act of 1993.[26] These categories of adjudications are not covered by part 19 and therefore a specific exclusion in the OCC rule is not necessary.

Section 19.206(b) defines ''final disposition'' as the date on which a decision or order disposing of the merits of the proceeding, or any other complete resolution of the proceeding such as a settlement or voluntary dismissal becomes final and unappealable, both within the OCC and to the courts.[27]

Section 19.206(c) defines ''party'' to mean a party, defined in 5 U.S.C. 551(3),[28] that is (1) an individual whose net worth did not exceed $2,000,000 at the time that the adversary adjudication was initiated; or (2) any owner of an unincorporated businesses, or any partnership, corporation, unit of local government or organization with a net worth not exceeding $7,000,000 and no more than 500 employees at the time that the adversary adjudication was initiated, except that the net worth limitation does not apply to certain tax-exempt organizations described in section 501(c)(3) of the Internal Revenue Code of 1986 or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act.[29] This definition also provides that the net worth and number of employees of the applicant and, where appropriate, any of its affiliates must be aggregated when determining the applicability of this definition. The OCC is including this aggregation provision, which is not included in the ACUS Model Rule, because, as discussed below, the final rule requires information on affiliates for certain parties.

Section 19.206(d) defines ''position of the OCC'' to mean the OCC's position in an adversary adjudication as well as the action or failure to act by the OCC upon which the adversary adjudication is based. This paragraph also provides that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication if the party has unreasonably drawn out the proceeding.[30]

Section 19.206(e) defines ''presiding officer'' as an official, whether an ALJ or otherwise, that presided over the adversary adjudication or the official presiding over an EAJA proceeding.[31] As noted below in § 19.207, upon receipt of an EAJA application, the OCC will, to the extent feasible, refer the matter to the official who heard the underlying adversary adjudication.

Application Requirements

Section 19.207 sets out application requirements for a party seeking an award under EAJA. This section requires a party to file an application with the OCC within 30 days after the OCC's final disposition of the adversary adjudication. It also requires the application to include (1) the identity of the applicant and the adjudicatory proceeding for which an award is sought; (2) a showing that the applicant has prevailed and identification of the OCC position that the applicant alleges was not substantially justified; (3) the basis for the applicant's belief that the position was not substantially justified; (4) unless the applicant is an individual, the number of employees of the applicant and a brief description of the type and purpose of the organization or business; (5) a showing of how the applicant meets the definition of ''party'' under § 19.206(c), including documentation of net worth pursuant to § 19.208; (6) documentation of the fees and expenses sought per § 19.209; (7) signature by the applicant or the applicant's authorized officer or attorney; (8) any other matter the applicant wishes the OCC to consider in determining whether and in what

[22] *See* 31 CFR 6.5. *See also, e.g., Pierce* v. *Underwood,* 487 U.S. 552 (1988); *Miles* v. *Bowen,* 632 F. Supp. 282 (M.D. Ala. 1986).

[23] 5 U.S.C. 504(a)(4).

[24] *See* 5 U.S.C. 504(b)(1)(C) and § 2.01(b) of the ACUS Model Rule.

[25] Section 554 of title 5 does not apply to: (1) a matter subject to a subsequent trial of the law and the facts de novo in a court; (2) the selection or tenure of an employee, except a [sic] administrative law judge appointed under section 3105 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; or (6) the certification of worker representatives. 5 U.S.C. 554(a).

[26] EAJA and the ACUS Model Rule specifically exclude: (1) an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; (2) any appeal of a decision made pursuant to section 7103 of title 41 before an agency board of contract appeals as provided in section 7105 of title 41; (3) any hearing conducted under chapter 38 of title 31; and (4) the Religious Freedom Restoration Act of 1993.

[27] *See* § 2.01(e) of the ACUS Model Rule.

[28] Section 551(3) defines ''party'' to include a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes.

[29] *See* 5 U.S.C. 504(b)(1)(B) and § 2.01(f) of the ACUS Model Rule.

[30] *See* 5 U.S.C. 504(b)(1)(E) and § 2.01(g) of the ACUS Model Rule.

[31] *See* the definition of ''adjudicative officer'' in 5 U.S.C. 504(b)(1)(D) and § 2.01(a) of the ACUS Model Rule. The OCC has chosen to use the term ''presiding officer'' instead of ''adjudicative officer'' as that is the term used elsewhere in part 19.

amount an award should be made; and (9) written verification under penalty of perjury that the information contained in the information provided is true and correct. These application requirements are based on § 3.01 of the ACUS Model Rule,[32] except for the provision, taken from the Treasury rule,[33] providing that the applicant may include other matters for the OCC to consider. The OCC believes that this further information could assist the presiding officer when reviewing the EAJA claim and, by including this information at the application stage, may make the EAJA process more efficient.

Although not included in EAJA or the ACUS Model Rule, § 19.207(c) provides that, upon receipt of an EAJA application, the OCC will to the extent feasible refer the matter to the official who heard the underlying adversary adjudication. The OCC believes that the official presiding over the adversary proceeding subject to the EAJA application is in the best position to review the EAJA application.

Net Worth Exhibit

Section 19.208 requires specific net worth documentation to accompany certain EAJA applications. This documentation is necessary to determine whether the applicant meets the definition of ''party'' under § 19.206(c) and therefore may be eligible for an EAJA award. Paragraph (a) requires an applicant, other than an applicant that is a non-profit or a cooperative association, to provide with its EAJA application a detailed exhibit of the applicant's, and where applicable, any of its affiliates', net worth at the time the adversary adjudication was initiated. Unless otherwise required, this paragraph permits this exhibit to be in any form convenient to the applicant that provides full disclosure of the applicant's and affiliates' assets and liabilities sufficient to determine whether the applicant qualifies under the standards of this subpart. Furthermore, this paragraph permits a presiding officer to require an applicant to file additional information to determine its eligibility for an award. These net worth exhibit requirements are taken from § 3.02 of the ACUS Model Rule, except that the final rule requires the net worth information from affiliates, where appropriate. Because of the structure and interrelatedness of many financial institutions, the OCC believes that affiliate net worth will often prove relevant when determining eligibility for an EAJA award. The OCC notes that the EAJA rules issued by Treasury, the Board, and the FDIC require net worth information from affiliates to determine eligibility under EAJA.[34]

Section 19.208 also includes further provisions included in the Board's and the FDIC's EAJA regulations but not included in the ACUS Model Rule.[35] These provisions provide more detailed information as to what the OCC will accept in satisfaction of the net worth exhibit requirement or pertain specifically to national banks and Federal savings associations. Specifically, paragraph (a)(1) permits the use of unaudited financial statements for individual applicants as well as certain financial statements or reports submitted to a Federal or State agency for determining individual net worth, unless the presiding officer or the OCC otherwise requires. For applicants or affiliates that are not banks or savings associations, paragraph (a)(2) provides that net worth will be considered to be the excess of total assets over total liabilities as of the date the underlying proceeding was initiated. For banks and savings associations, paragraph (a)(3) requires the submission of a Consolidated Report of Condition and Income (Call Report) and provides that net worth is the total equity capital as reported in the Call Report filed for the last reporting date before the initiation of the proceeding.

Similar to § 3.02 of the ACUS Model Rule, paragraph (b) provides that the net worth exhibit will be included in the public record of the proceeding unless an applicant believes that there are legal grounds for withholding it from disclosure and requests that the documents be filed under seal or otherwise treated as confidential.

Documentation of Fees and Expenses

As provided in § 3.03 of the ACUS Model Rule, § 19.209 requires applications to be accompanied by adequate documentation of the fees and other expenses incurred after initiation of the adversary adjudication. This information is necessary to determine any EAJA award. Specifically, this section requires a separate itemized statement for each professional firm or individual whose services are covered by the application showing the hours spent in connection with the proceeding by each individual, a description of the specific services provided, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. This section also authorizes a presiding officer to require an applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed.

Unlike the ACUS Model Rule, this provision also provides that an application seeking an increase in fees to account for inflation pursuant to § 19.215(d)(1)(i), discussed below, also must include adequate documentation of the change in the consumer price index for the attorney or agent's locality.

Filing and Service of Documents

As in § 4.01 of the ACUS Model Rule, § 19.210 requires applications for an award, or any accompanying documentation related to an application, to be filed and served on all parties to the proceeding in accordance with § 19.11, Service of papers, except for confidential information pursuant to § 19.208(b).

Answer to Application

As provided in § 4.02 of the ACUS Model Rule, § 19.211 provides that Enforcement Counsel may file an answer to an EAJA application within 30 days after service of the application except in cases involving settlement negotiations under § 19.213. This section provides that failure to file an answer within 30 days may be treated as consent to the award requested unless Enforcement Counsel requests an extension of time for filing or files a statement of intent to negotiate a settlement under § 19.213. This section requires the answer to explain in detail any objections to the award requested and identify the facts supporting Enforcement Counsel's position. For any facts not already in the record of the proceeding, this section requires Enforcement Counsel to provide supporting affidavits or a request for further proceedings under § 19.214 with the answer. Unlike the ACUS Model Rule, § 19.211 does not include information related to settlement negotiations and instead cross-references to § 19.213, which discusses settlement of an EAJA award. The OCC believes that, for ease of use, all settlement provisions should be included in the same section of the regulation.

Reply

As in § 4.03 of the ACUS Model Rule, § 19.212 permits an applicant to reply within 15 days after service of an answer. For facts not already in the

[32] *See also* 5 U.S.C. 504(a)(2).

[33] 31 CFR 6.8(d).

[34] *See* 31 CFR 6.4(f) (Treasury); 12 CFR 263.105 (Board); and 12 CFR 308.177 (FDIC).

[35] *Id.*

record, the applicant is required to provide supporting affidavits or a request for further proceedings pursuant to § 19.214 with the answer.

Settlement

As in § 4.04 of the ACUS Model Rule, § 19.213 provides that the applicant and Enforcement Counsel may agree to a proposed settlement before final action on the application, either in connection with a settlement of the underlying proceeding or after conclusion of an underlying proceeding, in accordance with the OCC's standard settlement procedure pursuant to § 19.15, Opportunity for informal settlement. In a case where a prevailing party and Enforcement Counsel agree on a proposed settlement of an award before an EAJA application has been filed, this section requires the application to be filed with the proposed settlement. Section 19.213 also clarifies that, if a proposed settlement of an underlying proceeding provides for each side to pay its own expenses and the settlement is accepted, no application under this subpart may be filed. However, this section differs from § 4.04 of the ACUS Model Rule by including a provision the ACUS Model Rule includes in its section relating to an answer to an application, § 4.02. Specifically, § 19.213 specifies that, if after an application is submitted, Enforcement Counsel and the applicant believe that they can reach a settlement, they may file a joint statement of their intent to negotiate a settlement. Filing this statement will extend the time for filing an answer under § 19.211 for an additional 30 days. Further extensions could be granted by the presiding officer at the joint request of the applicant and Enforcement Counsel. As with § 19.211, the OCC believes that this provision is better placed in § 19.213 so that all settlement information is included in the same section of the regulation.

Further Proceedings

Ordinarily, the determination of an EAJA award would be made on the basis of the written record. However, § 19.214(a) permits an applicant or Enforcement Counsel to request the filing of additional written submissions, an informal conference, oral argument, discovery, or an evidentiary hearing with respect to issues other than whether the OCC's position was substantially justified, such as issues involving the applicant's eligibility or substantiation of fees or expenses. The presiding officer may permit these further proceedings if necessary for a full and fair decision on the application. The presiding officer also may order these additional proceedings on its own initiative. In addition, paragraph (a) requires that further proceedings be held as promptly as possible so as not to delay resolution of the EAJA application. The final rule lists applicant eligibility or substantiation of fees and expenses as examples of permissible issues for further proceedings. Paragraph (a) is based on § 4.05 of the ACUS Model Rule. However, § 19.214 does not contain the ACUS Model Rule's statement regarding the basis for a decision on whether the OCC's position was substantially justified. The OCC believes it is more appropriate to include this statement in § 19.215, Decision. In addition, to compile a more complete list of all available further proceedings, the final rule also permits the applicant or Enforcement Counsel to request an informal conference, which is not listed in the ACUS Model Rule.

As in § 4.05 of the ACUS Model Rule, § 19.214(b) requires that any request for further proceedings specifically identify the information sought or any disputed issues and explain why additional proceedings are necessary to resolve the issues.

Decision

The final rule's section on EAJA decisions, § 19.215, is based on 5 U.S.C. 504(a)(3) and in part on § 4.06 of the ACUS Model Rule. Section 19.215(a) provides that a presiding officer must base its decision on whether the position of the OCC was substantially justified on the administrative record as a whole of the adversary adjudication for which fees and other expenses are sought. The ACUS Model Rule includes this provision in its section on further proceedings, § 19.214. However, the OCC believes this requirement better belongs in the section of the regulation outlining EAJA decisions because it provides parameters for the presiding officer's decision.

As in § 4.06 of the ACUS Model Rule, § 19.215(b) mandates the timing of the presiding officer's decision. It requires the presiding officer to issue a recommended decision in writing on an EAJA application within 90 days after the time for filing a reply or within 90 days of the completion of further proceedings held pursuant to § 19.214.[36]

Also, as in § 4.06 of the ACUS Model Rule, paragraph (c) of § 19.215 provides that a decision must include written findings and conclusions on an applicant's eligibility and status as a prevailing party. The decision also must include, if applicable, an explanation of the reasons for any difference between the amount requested and the amount awarded, findings on whether the Enforcement Counsel's or OCC's position was substantially justified, whether the applicant unduly and unreasonably protracted the proceedings, or whether special circumstances make an award unjust. Paragraph (c) differs from § 4.06 of the ACUS Model Rule in that it includes language taken from § 4.05 of the ACUS Model Rule. Specifically, paragraph (c) provides that the presiding officer must determine whether or not the position of the OCC was substantially justified on the basis of the administrative record as a whole of the adversary adjudication for which fees and other expenses are sought. The OCC believes this provision is a better fit in the section of the regulation outlining EAJA decisions.

Section 19.215(d) provides the requirements for EAJA decisions. Paragraphs (d)(1), (2) and (3) of § 19.215 are not included in the ACUS Model Rule but are based on the EAJA statute, provisions included in the FDIC and Board EAJA rules,[37] and provisions included in the prior ACUS Model Rule that ACUS determined were largely substantive matters beyond the Conference's statutory charge.[38] The OCC believes that these provisions provide important details on the basis for EAJA award amounts that should apply to all EAJA applications and be included in its EAJA regulation.

Specifically, § 19.215(d)(1) provides that EAJA awards may include the reasonable expenses of expert witnesses; the reasonable cost of any study, analysis, report, test, or project; and reasonable attorney or agent fees incurred after initiation of the adversary adjudication subject to the EAJA application. This paragraph also provides that the presiding officer will base awards on prevailing market rates for the kind and quality of the services furnished, even if the services were provided without charge or at reduced rate to the applicant. However, no award for the fee of an attorney or agent under this subpart may exceed the hourly rate specified in EAJA (5 U.S.C. 504(b)(1)(A)) except, as permitted by EAJA, to account for inflation as requested by the applicant and documented in the EAJA application or if a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved,

[36] The ACUS Model Rule provides that an agency may determine the specific time period for this section.

[37] 12 CFR 263.106, 308.175.

[38] *See* 84 FR 38934.

justifies a higher fee.[39] Pursuant to EAJA, this paragraph also prohibits an award for expert witness fees that exceed the highest rate paid for expert witnesses by the OCC.[40]

Section 19.215(d)(2) provides factors the presiding officer should consider in determining the reasonableness of the attorney, agent, or expert witness fees. These factors are: (1) if in private practice, the attorney's, agent's, or witness' customary fee for similar services; (2) if an employee of the applicant, the fully allocated cost of the attorney's, agent's, or witness' services; (3) the prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services; (4) the time actually spent in the representation of the applicant; (5) the time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and (6) any other factors as may bear on the value of the services provided.

Section 19.215(d)(3) provides parameters for the award of costs for any study, analysis, report, test, project, or similar matter. Specifically, the presiding officer may award the reasonable cost of these services prepared on behalf of the applicant to the extent that the charge for the service does not exceed the prevailing rate for similar services and the presiding officer finds that the service was necessary for preparation of the applicant's case.

As in § 4.06 of the ACUS Model Rule, § 19.215(d)(4) permits a presiding officer to reduce the amount to be awarded or deny an award to the extent that the party during the proceedings engaged in conduct that unduly and unreasonably protracted final resolution of the matter in controversy. Unlike § 4.06 of the ACUS Model Rule, paragraph (d)(4) also permits the presiding officer to reduce or deny the award if special circumstances make the award sought unjust. This provision is included in 5 U.S.C. 504(a)(1) and in the Treasury rule[41] and is noted in the authority and scope section of subpart L, § 19.205(a). The OCC believes it is helpful to include it in § 19.215 as this section is specifically related to the decision making of the presiding officer.

Finally, § 19.215(e) provides that the Comptroller will issue a final decision on the EAJA application or remand the application to the presiding officer for further proceedings in accordance with § 19.40, Review by the Comptroller. This provision is not included in the ACUS Model Rule. However, the OCC believes that for clarity and completeness its EAJA rule should specify the final agency action on the EAJA application, as delineated in part 19.

Agency Review

As in § 4.07 of the ACUS Model Rule, § 19.216 allows an applicant or Enforcement Counsel to seek review of the presiding officer's decision on the EAJA application, in accordance with § 19.39, Exceptions to recommended decision. However, § 19.216 does not include the provision in the ACUS Model Rule that permits the agency to review the decision on its own initiative. The OCC does not believe that this provision is necessary because the regulation includes a separate provision in § 19.215(e), not included in the Model rule, that provides for a final decision on the EAJA application by the Comptroller or the Comptroller's remand of the application to the presiding officer for further proceedings.

Judicial Review

As provided by 5 U.S.C. 504(c)(2) and in § 4.08 of the ACUS Model Rule, § 19.217 provides for judicial review of final OCC decisions on awards in accordance with 5 U.S.C. 504(c)(2).

Stay of Decision Concerning Award

As in § 4.09 of the ACUS Model Rule, § 19.218 provides for an automatic stay of an EAJA proceeding until the OCC's final disposition of the decision on which the application is based and either the time period for judicial review has expired, or if judicial review is sought, final disposition is made by a court and no further judicial review is available.

Payment of Award

As in § 4.10 of the ACUS Model Rule, § 19.219 provides that an applicant seeking payment of an award must submit to the OCC's Litigation Group a copy of the final decision granting the award accompanied by a certification that the applicant will not seek review of the decision in the United States courts. This section also provides that the OCC pay any amount owed to an applicant within 90 days.

Subpart M—Procedures for Reclassifying an Insured Depository Institution Based on Criteria Other Than Capital

Current subpart M of part 19 and 12 CFR 165.8 set out procedures for reclassifying a national bank or Federal savings association, respectively, to a lower capital category based on criteria other than capital, pursuant to section 38 of the FDIA (12 U.S.C. 1831o) and the prompt corrective action rule, 12 CFR part 6. These procedures are substantively the same, and the final rule amends subpart M to include Federal savings associations in addition to national banks and removes § 165.8. As this subpart currently also applies to insured Federal branches of foreign banks, the final rule specifically includes insured Federal branches in the scope section.

Specifically, the final rule replaces the term ''bank'' each time it appears in subpart M with the term ''insured depository institution,'' and defines this term to mean an insured national bank, an insured Federal savings association, an insured Federal savings bank, or an insured Federal branch of a foreign bank. The final rule also replaces the incorrect reference to subpart M with a reference to part 6 in § 19.220. In addition, the final rule makes a conforming change to § 19.221(b)(3) to replace the phrase ''a written appeal of the proposed classification'' with ''a written response to the proposed reclassification,'' which is the terminology used elsewhere in this section. Furthermore, as in §§ 19.35, 19.112, and 19.120, the final rule adds paragraph (g)(3) to § 19.221 to provide rules governing electronic presentations in the course of a hearing. Specifically, this provision provides that, based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If required by the presiding officer, each party will be responsible for its own presentation and related costs unless the parties agree otherwise. As indicated previously, this new language is necessary to account for the routine use of electronic presentations that current part 19 does not address. The final rule also makes a conforming change in paragraph (g)(2) that allows, by stipulation of the parties or by order of the presiding officer, a court reporter or other authorized person to administer the required oath to a witness remotely without being in the physical presence of the witness. Additionally, the final rule revises the heading to subpart M to include insured depository institutions and to describe the subject of the subpart more accurately. Lastly, the final rule makes technical changes to 12 CFR 6.3, 6.4, 6.5, and 6.6 to remove the separate references to § 165.8 with respect to savings associations.

[39] 5 U.S.C. 504(b)(1)(A).

[40] *Id.*

[41] *See* 31 CFR 6.14.

Subpart N—Order To Dismiss a Director or Senior Executive Officer

Current subpart N of part 19 and 12 CFR 165.9 set out procedures associated with an order to dismiss a director or senior executive officer of a national bank or Federal savings association, respectively, pursuant to an order issued under section 38 of the FDIA (12 U.S.C. 1831o) and, with respect to national banks, the prompt corrective action rule, 12 CFR part 6. Subpart N and § 165.9 are substantively the same, and the final rule applies subpart N to Federal savings associations in addition to national banks and removes § 165.9. The final rule also replaces the term ''bank'' each time it appears in § 19.230 with the term ''insured depository institution'' and defines the term based on section 3 of the FDIA (12 U.S.C. 1813(c)(2)) to mean an insured national bank, an insured Federal savings association, an insured Federal savings bank, or an insured Federal branch of a foreign bank.

The final rule also amends § 19.231(b). This paragraph currently provides that a director or senior executive officer who has been served with a directive for dismissal has 10 calendar days to file a written request for reinstatement, unless the OCC allows further time as requested of the Respondent. The final rule provides that failure by the Respondent to file this request within the specified time period will constitute a waiver of the opportunity to respond and consent to the dismissal. The OCC is adding this statement to the regulation to clarify the result of a failure to request reinstatement. The final rule also makes a stylistic revision to § 19.231(b) to remove passive sentence structure.

In addition, the final rule amends § 19.231(c), which currently requires that the OCC issue an order directing an informal hearing to commence no later than 30 days after receipt of the request for a hearing unless the respondent requests a later date. The final rule amends this provision to provide that a later hearing date may occur only if permitted by the OCC, and, therefore, the request for an extension will not be automatically approved. This change allows the OCC some discretion as to how far into the future a hearing may take place.

The final rule amends § 19.231(d) to provide rules governing electronic presentations in the course of a hearing. Specifically, the amendment provides that, based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If required by the presiding officer, each party will be responsible for its own presentation and related costs unless the parties agree otherwise. This new language is necessary to account for the routine use of electronic presentations that current part 19 does not address. The final rule also makes a conforming change in § 19.231(d)(5) to allow, by stipulation of the parties or by order of the presiding officer, a court reporter or other authorized person to administer the required oath to a witness remotely without being in the physical presence of the witness. The final rule also makes a clarifying change in paragraph (d)(1), Hearing procedures. Among other things, this paragraph currently provides that a Respondent has the right to introduce relevant written materials and to present oral argument. The final rule clarifies that these written materials and oral arguments may be made at the hearing. This clarification ensures that the Respondent is aware that this right is provided during the hearing and not outside of the hearing context. The final rule also moves the sentence regarding oral testimony and witnesses in paragraph (d)(1) to paragraph (d)(5) to better organize paragraph (d) and adds paragraph headings.

Furthermore, the final rule revises the heading of subpart N to describe the subject of the subpart more accurately.

Lastly, the final rule makes technical changes to 12 CFR 6.6 to remove the separate reference to § 165.9 with respect to Federal savings associations. Because §§ 165.8 and 165.9 are the only sections in current part 165, the final rule removes part 165 in its entirety.

Subpart O—Civil Money Penalty Inflation Adjustments

Current part 19, subpart O, and § 109.103 provide the statutorily required formula to calculate inflation adjustments for civil money penalties assessed against national banks and Federal savings associations, respectively. These sections also indicate that the OCC will publish, on or before January 15 of each calendar year, an annual notice in the **Federal Register** of the maximum penalties the OCC may assess. The final rule retains subpart O and removes § 109.103. No amendments are necessary to apply subpart O to Federal savings associations. The final rule amends the section heading to be more descriptive and makes a stylistic revision in paragraph (a) to remove passive sentence structure.

Subpart Q—Forfeiture of Franchise for Money Laundering or Cash Transaction Reporting Offenses

Twelve U.S.C. 93(d)(1) provides that the Comptroller will, after receiving notification from the U.S. Attorney General of a conviction of a criminal offense under section 1956 or 1957 of title 18 (18 U.S.C. 1956, 1957) or may, after receiving notification for the U.S. Attorney General of a conviction of a criminal offense under section 5322 or 5324 of title 31 (31 U.S.C. 5322, 5324), issue to the convicted national bank or Federal branch or agency of foreign bank a notice of the Comptroller's intent to terminate all rights, privileges and franchises of the bank or Federal branch or agency and to schedule a pretermination hearing. The offenses include financial crimes, including money laundering (18 U.S.C. 1956), engaging in monetary transactions in criminally derived property (18 U.S.C. 1957), and structuring transactions to evade reporting requirements (31 U.S.C. 5324). Twelve U.S.C. 1464(w) imposes the same requirement with respect to convicted Federal savings associations.

Part 19 currently does not include specific procedures for a charter pretermination hearing. The final rule adds a new subpart Q that sets forth Administrative Procedure Act (APA) compliant procedures for pretermination hearings, which will be conducted before a presiding officer appointed by the Comptroller. These procedures are largely analogous to the deposit insurance termination hearing procedures instituted by the FDIC and NCUA for insured State depository institutions and federally insured credit unions, respectively, that are convicted of the same offenses.

Specifically, § 19.250 makes subpart A applicable, except as provided in new subpart Q, to proceedings by the Comptroller to determine whether, pursuant to 12 U.S.C. 93(d) or 12 U.S.C. 1464(w), as applicable, to terminate all rights, privileges, and franchises of a national bank, Federal savings association, or Federal branch or agency convicted of a criminal offense under 18 U.S.C. 1956 or 1957 or 31 U.S.C. 5322 or 5324.

Section 19.251(a) provides that, after receiving written notification from the U.S. Attorney General of a conviction of a criminal offense under sections 18 U.S.C. 1956 or 1957 or 31 U.S.C. 5322 or 5324, the Comptroller will issue a written notice of intent to terminate all rights, privileges and franchises to the convicted national bank, Federal savings association, or Federal branch or agency and schedule a pretermination

hearing. Section 19.251(b) details the requisite contents of the notice and § 19.251(c) provides that failure to answer the notice will be deemed consent to the termination and that the Comptroller may order the termination. This notice of intent to terminate is similar to the notice in § 19.18 except that the subpart Q notice of intent lists the basis of termination pursuant to factors listed in § 19.253 instead of the statement of matters of fact or law; the time within which to file an answer in response to the notice of intent will be established by the presiding officer instead of by law or regulation; and the answer must be filed with the OCC instead of with OFIA. Section 19.251(d) provides that the OCC will serve the notice upon the national bank, Federal savings association, or Federal branch or agency in the manner set forth in § 19.11(c).

Section 19.252 provides that the Comptroller will designate a presiding officer to conduct the pretermination hearing. The presiding officer has the same powers set forth in § 19.5, including the discretion necessary to conduct the pretermination hearing in a manner that avoids unnecessary delay. Section 19.252 also provides that the presiding officer may limit the use of discovery and limit opportunities to file written memoranda, briefs, affidavits, or other materials or documents to avoid relitigating facts already stipulated to by the parties, conceded to by the institution, or otherwise already firmly established by the underlying criminal conviction.

Section 19.253 provides the factors the Comptroller will take into account when determining whether or not to terminate a franchise as set forth in 12 U.S.C. 93(d) and 1464(w). The factors are: (1) the extent to which directors or senior executive officials knew of or were involved in the criminal offense, (2) the extent to which the offense occurred despite the existence of policies and procedures within the institution designed to prevent the occurrence of the offense, (3) the extent to which the institution fully cooperated with law enforcement authorities regarding the investigation of the offense, (4) the extent to which the institution has implemented additional internal controls since the commission of the offense to prevent a reoccurrence, and (5) the extent to which the interest of the local community in having adequate deposit and credit services available would be threatened by the forfeiture of the franchise.

Lastly, § 19.254 delineates the right of judicial review under 12 U.S.C. 1818(h) of a termination order as required by 12 U.S.C. 93(d)(1)(C) and 1464(w)(1)(C).

Technical Changes

In addition to the technical changes discussed elsewhere in this **SUPPLEMENTARY INFORMATION**, the final rule makes technical changes throughout parts B through P by: (1) replacing the word ''shall'' with ''must,'' ''will,'' or other appropriate language, which is the more current rule writing convention for imposing an obligation and is the recommended drafting style of the **Federal Register**; (2) conforming citation styles and providing more detailed references to the cited statutes; (3) conforming abbreviations, including replacing the use of the term ''administrative law judge'' with ''ALJ; (4) replacing gender references such as ''him,'' ''his'' or ''her'' with gender-neutral terminology; and (5) making other non-substantive grammatical, clarifying, organizational, and stylistic changes. The final rule also makes a technical change to 12 CFR 3.405, which references cease and desist proceedings with respect to minimum capital ratios, to remove the reference to part 109 for savings associations and replace it with part 19 because this final rule removes part 109 and applies part 19 to Federal savings associations. Similarly, this final rule makes a new technical change to § 150.570, which sets forth the rules governing the conduct of a hearing required under 12 U.S.C. 1464(n)(10)(B) for revocation of fiduciary powers, to replace the reference to part 109 with a reference to part 19.

B. Amendments to the Board's Local Rules—Final Rules

The Board is adopting a final rule to amend subpart B of part 263—the Board Local Rules Supplementing the Uniform Rules—and to create a new subpart K (§§ 263.450 through 263.457) establishing new rules governing all Board formal investigations. The new subpart K replaces subpart L of Regulation LL (12 CFR part 238), which is eliminated. The Board did not receive any comments on its proposed changes to the Local Rules and is adopting the proposed amendments.

The revised Local Rules in subpart B apply only to adjudicatory proceedings initiated on or after the effective date of this final rule, April 1, 2024. The previous version of the Local Rules in subpart B, which are included in appendix A to part 263 of this final rule, are applicable to all adjudicatory proceedings initiated before, April 1, 2024.

The Board revised its Local Rules to conform them to the changes in the Uniform Rules and to facilitate the use of electronic communications and technology in Board proceedings. In addition, to promote transparency and fairness, the Board added the new subpart K establishing rules governing all Board formal investigations and a new section in subpart B (§ 263.57) establishing rules for the imposition of sanctions in administrative proceedings. Because these new sections are modeled on the rules already adopted by other banking regulators, they promote uniformity in the rules of banking regulators. Subparts C through J of part 263 have not been amended and remain in effect.

Subpart B—Board Local Rules Supplementing the Uniform Rules

Section 263.52 Address for Filing

Section 263.52 provides an electronic mail address for papers to be filed electronically with the Secretary of the Board.

Section 263.53 Discovery Depositions

Section 263.53 requires parties to state in the application for a discovery deposition the manner (*e.g.,* remote means, in person) of the deposition, to note that the ALJ can consider the manner of the deposition in determining whether to grant or modify it, and to clarify that depositions can be conducted by remote means and witnesses can be sworn remotely.

Section 263.55 Board as Presiding Officer

Section 263.55 clarifies that when the Board designates itself, one of its members, or an authorized officer, to serve as presiding officer in a formal hearing, the authority of the Board or its designee will include all the authority provided to an ALJ under the rules governing formal hearings.

Section 263.57 Sanctions Related to Conduct in Adjudicatory Proceedings

Section 263.57 is a new section that establishes the rules governing the imposition of sanctions against parties or persons participating in administrative adjudicatory proceedings. The new section: (a) explicitly authorizes the ALJ to impose sanctions against parties or persons; (b) describes the sanctions the ALJ may impose; (c) describes procedures for imposing sanctions; and (d) establishes that the ALJ or the Board may impose other sanctions authorized by applicable statute or regulation.

Subpart K—Formal Investigative Proceedings

Subpart K is a new subpart that establishes a single set of rules governing formal investigations for all Board-regulated organizations and any other entity or individual that the Board has authority to investigate or bring an enforcement action against. Subpart K, which is modeled on the investigative procedures of other Federal financial industry enforcement agencies, defines a formal investigative proceeding by the Board and its scope; delineates some of the powers of the Board's designated representatives conducting formal investigative proceedings; requires the confidentiality of formal investigative proceedings; provides for certain rights of witnesses in formal investigative proceedings; and establishes investigative subpoena procedures. Subpart K governs only the conduct of formal investigations; administrative adjudicatory proceedings continue to be governed by the Board's Uniform Rules and Local Rules (12 CFR part 263, subparts A and B).

C. Amendments to the FDIC's Local Rules—Final Rules

The FDIC is adopting a final rule to amend its Local Rules set forth at 12 CFR part 308, subpart B, General Rules of Procedure, which supplement the Uniform Rules set forth in 12 CFR part 308, subpart A. The FDIC did not receive any comments to the Local Rules and for the reasons stated herein and in the proposed rule, the FDIC is adopting the amendments as proposed.

The FDIC included a new § 308.100 as a technical change to clarify the applicability date of the revised Local Rules set forth in subpart B of this part. The newly revised rules only apply to adjudicatory proceedings initiated on or after the effective date of this final rule, April 1, 2024. Any adjudicatory proceedings initiated before April 1, 2024, continue to be governed by the previous version of the Local Rules included in appendix A in part 308 of this final rule.

The FDIC revised its Local Rules to reflect the current processes and procedures routinely ordered by the administrative law judges (ALJs) that mirror procedures followed in the Federal court system. The FDIC also added new provisions regarding modern discovery practices, depositions, and disclosure of expert witness testimony to promote cooperation, fairness, and transparency. Similar to the changes in the Uniform Rules, the FDIC updated the language throughout its Local Rules to reflect the modernized language used in rulemaking.

Section 308.100 Applicability Date

Section 308.100 was a technical change created to explain the applicability date of its revised Local Rules.

Section 308.102 Authority of Board of Directors and Administrative Officer

Section 308.102 was updated to reflect the current internal organization of the FDIC.

Section 308.103 Assignment to Administrative Law Judge (ALJ)

Section 308.103 was renamed to better reflect additional changes to how matters are assigned to an ALJ.

Section 308.104 Filings With the Board of Directors

Section 308.104 provides an electronic mail address for the FDIC's Administrative Officer, who is the official custodian of the record for administrative proceedings, and with whom all parties must file an electronic copy of all pleadings.

Section 308.107 Supplemental Discovery Rules

Section 308.107 was renamed to reflect the updates to the FDIC's discovery processes to include modern discovery practices and procedural orders issued by the ALJs and to allow for limited depositions.

Section 308.107(a) Scope of Discovery

Section 308.107(a) describes the permitted scope of discovery. The FDIC adopted the concept of ''proportionality'' in discovery production and set forth limits on electronically-stored information (ESI).

Section 308.107(b) Joint Discovery Plan

Section 308.107(b) adds a Joint Discovery Plan to the discovery process.

Section 308.107(c) Document and Electronically Stored Information (ESI) Discovery

Section 308.107(c) integrates the Local Rules with the Uniform Rules.

Section 308.107(d) Expert Witness Disclosures

Section 308.107(d) describes the required disclosures for expert witness testimony. Section 308.107(d)(2)(i) applies to professional experts who generally do not work for a party but are specifically engaged for the purpose of providing expert testimony. Section 308.107(d)(2)(ii) applies to those individuals whose expertise comes from the person's regular course of business such as, a commissioned bank examiner or bank personnel, who will be offered as an expert witness at the hearing.

Section 308.107(e) Depositions

Section 308.107(e) allows parties to pursue limited discovery depositions of individuals with direct knowledge of facts relevant to the proceeding and individuals designated as expert witnesses. Section 308.107(e)(1) authorizes deposition discovery only to the extent that it is proportional to the needs of the case and the information sought from the depositions cannot be obtained from another source that is more convenient, less burdensome, or less expensive. In the absence of extraordinary circumstances, depositions are limited to individuals expected to testify at the hearing.

Section 308.107(f) Discovery Motions

Section 308.107(f) clarifies certain matters related to discovery motions. Section 308.107(f)(1) clarifies that the ALJ must limit inappropriate discovery either on motion, or on their own initiative. Section 308.107(f)(2) provides that parties may move to terminate depositions that are being conducted in bad faith or an inappropriate manner. Section 308.107(f)(3) clarifies that the provisions of § 308.25(f), governing motions to compel document discovery, apply equally to all motions to compel discovery.

V. Discussion of OCC Changes to Part 4, Service of Process

The final rule amends subpart A of 12 CFR part 4, Organization and Functions, to add a new § 4.8 that addresses service of process. This new provision puts private parties on notice of the established process they should use in serving the OCC, Comptroller, or officers or employees of the OCC in a private action. The OCC is codifying this process in the final rule to help avoid possible confusion as to where and how private parties serve the OCC, Comptroller, or officers or employees of the OCC and to ensure that the OCC has adequate notice to respond to a complaint or other filing. The final rule provides that ''officers'' are officials who are not employees of the OCC, such as an ALJ.

Specifically, § 4.8(a) provides that § 4.8(b), (c), and (d) apply to service of process upon the OCC, the Comptroller acting in their official capacity, officers or employees of the OCC who are sued in their official capacity, and officers or employees of the OCC who are sued in an individual capacity for an act or omission occurring in connection with

duties performed on the behalf of the OCC. Section 4.8(b) provides that service of process for actions in Federal courts should be made upon the OCC, the Comptroller, or officers or employees of the OCC by serving the United States under the procedures set forth in the Federal Rules of Civil Procedure governing the service of process upon the United States and its agencies, corporations, officers, or employees.[42] Section 4.8(c) provides that service of process for actions brought in State courts should be made upon the OCC, the Comptroller, or officers or employees of the OCC by sending copies of the summons and complaint by registered or certified mail to the Chief Counsel, Office of the Comptroller of the Currency, Washington, DC 20219. Section 4.8(c) also encourages parties to provide copies of the summons and complaint to the appropriate United States Attorney in accordance with the procedures set forth in the Federal Rules of Civil Procedure governing the service of process upon the United States and its agencies, corporations, officers, or employees.[43] Section 4.8(d) provides that only the Washington, DC headquarters office of the OCC is authorized to accept service of a summons or complaint and that the OCC, the Comptroller, or officers or employees of the OCC should be served with a copy of the summons or complaint at the Washington, DC headquarters office in accordance with § 4.8(b) or (c). This provision clarifies that a summons or complaint should not be sent to another office of the OCC.

Finally, § 4.8(e) provides that the OCC is not an agent for service of process upon a national bank, Federal savings association, or Federal branch or agency of a foreign bank. Instead, it directs parties to serve a summons or complaint upon the institution in accordance with the laws and procedures for the court in which the action has been filed. The OCC intends this provision to prevent further instances of parties attempting to serve a national bank through the OCC.

As indicated above, the OCC did not receive any comments on the proposed amendments to part 4 and is adopting them as proposed with one technical correction. The proposed rule set forth the incorrect authority section for part 4. The final rule includes the correct authority section, which is unchanged from the current rule.

[42] *See* Rule 4(i) of the Federal Rules of Civil Procedure.

[43] *Id.*

VI. Regulatory Analysis

A. Regulatory Flexibility Act

OCC: The Regulatory Flexibility Act (RFA)[44] requires an agency, in connection with a rule, to prepare a Final Regulatory Flexibility Analysis (FRFA) describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of $850 million or less and trust companies with total assets of $47 million or less)[45] or to certify that the final rule would not have a significant economic impact on a substantial number of small entities.

The OCC currently supervises approximately 1,070 institutions (commercial banks, trust companies, Federal savings associations, and branches or agencies of foreign banks, collectively banks), of which 661 are small entities.[46] The final rule could impact any OCC-supervised institution, including any of these small entities. However, it is unlikely that the rule would impact more than a *de minimis* number of OCC-supervised institutions in any given year.[47] Furthermore, the rule would facilitate the orderly determination of administrative proceedings and its proposed changes are primarily updates and clarifications of administrative procedure and in general reflect current practices. Therefore, the OCC concludes that the final rule would not impose more than minimal costs on institutions that may be impacted. Because the OCC estimates that expenditures, if any, associated with the final rule would be *de minimis,* the OCC certifies that the final rule does not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, an FRFA is not required.

[44] 5 U.S.C. 601 *et seq.*

[45] *See* the SBA's size thresholds for commercial banks and savings institutions, and trust companies, 13 CFR 121.201.

[46] Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if it should classify an institution as a small entity. The OCC used December 31, 2022, to determine size because a ''financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* footnote 8 of the SBA's *Table of Size Standards.*

[47] Based on activity during the past five years, approximately 23 banks (an average of less than 5 per year) would be impacted by the proposed changes to part 19, subparts A, B, C, I, L, and M. Furthermore, during the past five years the OCC has not received any Equal Access to Justice Act (EAJA) applications from a bank for the payment of attorney's fees.

Board: In accordance with the Regulatory Flexibility Act (RFA),[48] the Board published an initial regulatory flexibility analysis in the notice of proposed rulemaking. The Board did not receive any comments on its initial regulatory flexibility analysis. The RFA also requires an agency to prepare a final regulatory flexibility analysis generally describing the impact of the rule on small entities, unless the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[49] Under regulations issued by the Small Business Administration, a small entity includes a bank, bank holding company, or savings and loan holding company with assets of $850 million or less and trust companies with annual receipts of $47 million or less.[50]

Consistent with the analysis included in the initial regulatory flexibility analysis, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities. As explained above, the Agencies are amending the Uniform Rules and their local rules to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. In addition, the Board is establishing a single set of rules governing all formal investigations. These rules only establish procedures governing Board formal investigations and adjudicatory proceedings. The rules do not impose any requirement on regulated entities, and regulated entities would not need to take any action in response to the proposed rules. The rules will only apply to regulated entities if they become parties to administrative adjudications or are subject to formal investigations, which is unusual. Therefore, the rules will not have a significant economic impact on a substantial number of small entities.

FDIC: The RFA requires that, in connection with a final rule, an agency prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of the final rule on small entities.[51] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities, and publishes its certification and a short explanatory

[48] 5 U.S.C. 601 *et seq.*

[49] 5 U.S.C. 604; 605(b).

[50] 13 CFR 121.201.

[51] 5 U.S.C. 601 *et seq.*

statement in the **Federal Register** together with the rule. The SBA has defined ''small entities'' to include banking organizations with total assets of less than or equal to $850 million.[52] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of one or more of these thresholds typically represent significant effects for FDIC-supervised institutions.

As of the quarter ending December 30, 2022, the FDIC supervised 3,038 depository institutions,[53] of which 2,325 were considered small for the purposes of the RFA.[54]

As previously discussed, the Agencies are amending the Uniform Rules to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. The FDIC is also modifying the Local Rules of administrative practice and procedure. The amendments apply to administrative proceedings held by the FDIC and impose no significant additional burdens on small entities. Further, the FDIC typically brings less than five formal administrative proceedings annually. Therefore, the FDIC concludes that the final rule will not have a significant impact on a substantial number of small entities. For the reasons described above and pursuant to 5 U.S.C. 605(b), the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

NCUA: The RFA generally requires that, in connection with a rulemaking, an agency prepare and make available for public comment regulatory flexibility analysis that describes the impact of a proposed rule on small entities. A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include federally insured credit unions with assets less than $100 million) and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule. The final rule amends the Uniform Rules to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. The changes consist of updates and clarifications of administrative procedure and impose no significant new burdens on credit unions, parties to administrative actions, or counsel. Also, only a small number of federally insured credit unions and institution-affiliated parties are subject to actions that the final rule will govern, as the NCUA currently has only one pending proceeding and generally files a small number of cases. Accordingly, the NCUA certifies that the final rule will not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 [55] (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Agencies have reviewed this final rule and determined that it does not create any information collection or revise any existing collection of information. Accordingly, no PRA submissions will be made to the OMB with respect to this final rule. The Board reviewed the rule under the authority delegated to the Board by the OMB.

C. OCC Unfunded Mandates Reform Act of 1995

The OCC analyzed the rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA).[56] Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year ($182 million as adjusted for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

As discussed above, the OCC estimates that expenditures, if any, associated with the final rule would be *de minimis.* Therefore, the OCC concludes that the proposed rule would not result in an expenditure of $182 million or more annually by State, local, and Tribal governments, or by the private sector. Because the final rule does not trigger the UMRA cost threshold, the OCC has not prepared the written statement described in section 202 of the UMRA.

D. Riegle Community Development and Regulatory Improvement Act

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[57] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), the OCC, Board, and FDIC [58] must consider, consistent with principles of safety and soundness and the public interest: (1) any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions; and (2) the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[59]

With respect to administrative compliance requirements, the OCC, Board, and FDIC have considered the administrative burdens and the benefits of this final rule and believes that any burdens are necessary for proper OCC, Board, and FDIC supervision and also to update and conform the OCC's, Board's and FDIC's rules to current practices. As examples, the final rule allows for electronic filing of documents and expands the definition of the term ''document'' in discovery to account for the range of digital information now available. The final rule's benefits include clarifying existing requirements, codifying existing practice, removing unnecessary provisions, and updating and modernizing certain provisions. Further discussion of the consideration

[52] The SBA defines a small banking organization as having $850 million or less in assets, where ''a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' See 13 CFR 121.201 (as amended by 87 FR 69118, effective December 19, 2022). ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' See 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the FDIC-supervised institution is ''small'' for the purposes of RFA.

[53] FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

[54] FDIC Call Report data, December 31, 2022.

[55] 44 U.S.C. 3501–3521.

[56] 2 U.S.C. 1532.

[57] 12 U.S.C. 4802(a).

[58] RCDRIA does not apply to the NCUA.

[59] 12 U.S.C. 4802.

by the OCC, Board, and FDIC of these administrative compliance requirements is found in other sections of the final rule's **SUPPLEMENTARY INFORMATION** section.

Because this final rule is published on December 28, 2023, the April 1, 2024, effective date complies with the RCDRIA requirement that a rule take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[60] requires the OCC, Board, and FDIC[61] to use plain language in all proposed and final rules published after January 1, 2000. The Agencies have sought to present the final rule in a simple and straightforward manner. The Agencies received no comments on the use of plain language in the proposed rule.

F. NCUA Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests. In adherence to fundamental federalism principles, the NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the principles of the Executive Order. This rulemaking will not have a substantial direct effect on the states, on the connection between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule amends the Uniform Rules to recognize the use of electronic communications in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. The NCUA does not believe these changes will affect or alter the NCUA's relationship with State agencies or bodies that supervise federally insured, State-chartered credit unions or the division of supervisory responsibilities between the NCUA and these agencies or bodies. For example, the final rule does not affect the NCUA's requirement to provide notice to the commission, board, or authority having supervision of a State-chartered credit union of the NCUA's intent to institute certain enforcement actions and the grounds for them.[62] The NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

G. NCUA Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.[63] As discussed in the preceding regulatory procedure paragraphs, the final rule makes changes to procedural rules that apply to federally insured credit unions and institution-affiliated parties. These rules have no direct connection to families and their well-being, and the NCUA historically has brought only a small number of cases under these rules.

H. The Congressional Review Act

For purposes of the Congressional Review Act,[64] the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a ''major'' rule. If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[65] The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (3) a significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets.[66] OMB has determined that this final rule is not a major rule under the Congressional Review Act. As required by the Congressional Review Act, the Agencies will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

I. Effective Date

The Administrative Procedure Act[67] requires that a substantive rule must be published not less than 30 days before its effective date, except for: (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.[68] As stated above, section 302(b) of RCDRIA requires that regulations or amendments issued by the OCC, Board, and FDIC that impose additional reporting, disclosure, or other requirements on IDIs generally take effect on the first day of a calendar quarter that begins on or after the date of publication of the final rule, unless, among other things, the agency determines for good cause that the regulations should become effective before such time.[69] The final rule is effective April 1, 2024, which is more than 30 days after its publication date of December 28, 2023 and on the first date of a calendar quarter following publication.

List of Subjects

12 CFR Part 3

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Investments, National banks, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 4

Administrative practice and procedure, Freedom of information, Individuals with disabilities, Minority businesses, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Service of process, Women.

12 CFR Part 6

Federal Reserve System, Federal savings associations, National banks, Penalties.

12 CFR Part 19

Administrative practice and procedure, Crime, Equal access to justice, Federal savings associations, Investigations, National banks, Penalties, Securities.

12 CFR Part 108

Administrative practice and procedure, Crime, Savings associations.

12 CFR Part 109

Administrative practice and procedure, Penalties.

12 CFR Part 112

Administrative practice and procedure.

12 CFR Part 150

Administrative practice and procedure, Reporting and recordkeeping

[60] Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999), 12 U.S.C. 4809.

[61] This requirement does not apply to the NCUA.

[62] *See, e.g.,* 12 U.S.C. 1786(o).

[63] Public Law 105–277, 112 Stat. 2681 (1998).

[64] 5 U.S.C. 801 *et seq.*

[65] 5 U.S.C. 801(a)(3).

[66] 5 U.S.C. 804(2).

[67] Codified at 5 U.S.C. 551 *et seq.*

[68] 5 U.S.C. 553(d).

[69] 12 U.S.C. 4802(b).

requirements, Savings associations, Trusts and trustees.

12 CFR Part 165

Administrative practice and procedure, Savings associations.

12 CFR Part 238

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Investigations, Reporting and recordkeeping requirements, Savings and loan holding companies, Securities.

12 CFR Part 263

Administrative practice and procedure, Federal Reserve System, Investigations.

12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, Banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties, Savings associations.

12 CFR Part 747

Administrative practice and procedure, Claims, Credit unions, Crime, Equal access to justice, Investigations, Lawyers, Penalties, Share insurance.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

For the reasons set out in the preamble, and under the authority of 12 U.S.C. 93a, the OCC amends 12 CFR chapter I as follows:

PART 3—CAPITAL ADEQUACY STANDARDS

■ 1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1462, 1462a, 1463, 1464, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, 3909, 5412(b)(2)(B), and Pub. L. 116–136, 134 Stat. 281.

§ 3.405 [Amended]

■ 2. Section 3.405 is amended by removing the phrase ''(12 CFR 19.0 through 19.21 for national banks and 12 CFR part 109 for Federal savings associations)'' and adding in its place the phrase ''(12 CFR part 19)''.

PART 4—ORGANIZATION AND FUNCTIONS, AVAILABILITY AND RELEASE OF INFORMATION, CONTRACTING OUTREACH PROGRAM, POST-EMPLOYMENT RESTRICTIONS FOR SENIOR EXAMINERS

■ 3. The authority citation for part 4 continues to read as follows:

Authority: 5 U.S.C. 301, 552; 12 U.S.C. 1, 93a, 161, 481, 482, 484(a), 1442, 1462a, 1463, 1464, 1817(a), 1818, 1820, 1821, 1831m, 1831p–1, 1831o, 1833e, 1867, 1951 *et seq.,* 2601 *et seq.,* 2801 *et seq.,* 2901 *et seq.,* 3101 *et seq.,* 3401 *et seq.,* 5321, 5412, 5414; 15 U.S.C. 77uu(b), 78q(c)(3); 18 U.S.C. 641, 1905, 1906; 29 U.S.C. 1204; 31 U.S.C. 5318(g)(2), 9701; 42 U.S.C. 3601; 44 U.S.C. 3506, 3510; E.O. 12600 (3 CFR, 1987 Comp., p. 235).

■ 4. Add § 4.8 to subpart A to read as follows:

§ 4.8 Service of process upon the OCC or the Comptroller.

(a) *Scope.* Paragraphs (b) through (d) of this section apply to service of process upon the OCC, the Comptroller acting in their official capacity, officers (officials who are not employees of the OCC, such as an administrative law judge (ALJ) or employees of the OCC who are sued in their official capacity), and officers or employees of the OCC who are sued in an individual capacity for an act or omission occurring in connection with duties performed on the behalf of the OCC.

(b) *Actions in Federal courts.* Service of process for actions in Federal courts should be made upon the OCC, the Comptroller, or officers or employees of the OCC under the procedures set forth in the Federal Rules of Civil Procedure governing the service of process upon the United States and its agencies, corporations, officers, or employees.

(c) *Actions in State courts.* Service of process for actions in State courts should be made upon the OCC, the Comptroller, or officers or employees of the OCC by sending copies of the summons and complaint by registered or certified mail, same day courier service, or overnight delivery service to the Chief Counsel, Office of the Comptroller of the Currency, Washington, DC 20219. In these actions, parties also are encouraged to provide copies of the summons and complaint to the appropriate United States Attorney in accordance with the procedures set forth in Rule 4(i) of the Federal Rules of Civil Procedure.

(d) *Receipt of summons or complaint.* Only the Washington, DC headquarters office of the OCC is authorized to accept service of a summons or complaint. The OCC, the Comptroller, and officers or employees of the OCC must be served with a copy of the summons or complaint at the Washington, DC headquarters office in accordance with paragraphs (b) or (c) of this section.

(e) *Service of process upon a national bank, Federal savings association, or Federal branch or agency of a foreign bank.* The OCC is not an agent for service of process upon a national bank, Federal savings association, or Federal branch or agency of a foreign bank. Parties seeking to serve a national bank, Federal savings association, or Federal branch or agency of a foreign bank must serve the summons or complaint upon the institution in accordance with the laws and procedures for the court in which the action has been filed.

PART 6—PROMPT CORRECTIVE ACTION

■ 5. The authority citation for part 6 continues to read as follows:

Authority: 12 U.S.C. 93a, 1831o, 5412(b)(2)(B).

§ 6.3 [Amended]

■ 6. In § 6.3 amend paragraph (b)(3) by removing the phrase ''and with respect to national banks, subpart M of part 19 of this chapter, and with respect to Federal savings associations § 165.8 of this chapter'' and adding in its place the phrase ''and subpart M of part 19 of this chapter''.

§ 6.4 [Amended]

■ 7. In § 6.4 amend paragraphs (d)(1) and (2) by removing the phrase ''with respect to national banks and § 165.8 of this chapter with respect to Federal savings associations'' each time it appears.

§ 6.5 [Amended]

■ 8. Section 6.5 is amended by:

■ a. In paragraphs (a)(1) and (b), removing the phrase ''with respect to national banks, and §§ 6.4 and 165.8 of this chapter with respect to Federal savings associations,'' each time it appears.

■ b. In paragraph (a)(2), removing the phrase ''with respect to national banks and §§ 6.4 and 165.8 of this chapter with respect to Federal savings associations,''.

§ 6.6 [Amended]

■ 9. Section 6.6 is amended in paragraph (b) by removing the phrase ''with respect to national banks and subpart B of this part and § 165.9 of this chapter with respect to Federal savings associations''.

■ 10. Part 19 is revised to read as follows:

PART 19—RULES OF PRACTICE AND PROCEDURE

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93, 93a, 161, 164, 481, 504, 1462a, 1463(a), 1464; 1467(d), 1467a(r), 1817(j), 1818, 1820, 1831m, 1831o, 1832, 1884, 1972, 3102, 3108, 3110, 3349, 3909, 4717, and 5412(b)(2)(B); 15 U.S.C. 78*l,* 78o–4, 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, and 1639e; 28 U.S.C. 2461; 31 U.S.C. 330 and 5321; and 42 U.S.C. 4012a.

§ 19.0 Applicability date.

Subparts A through D and H, I, J, L, M, N, P, and Q of this part apply to adjudicatory proceedings initiated on or after April 1, 2024. The Rules of Practice and Procedure for national banks, Federal savings associations, and Federal branches and agencies that were in effect prior to April 1, 2024, set forth in appendix A to this part, continue to apply to adjudicatory proceedings initiated before April 1, 2024, unless the parties otherwise stipulate that the rules in this part, effective April 1, 2024, apply.

Subpart A—Uniform Rules of Practice and Procedure

§ 19.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record

after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (''FDIA'') (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Office of the Comptroller of the Currency (''OCC'') should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the OCC is the appropriate agency;

(e) Assessment of civil money penalties by the OCC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Any provision of law referenced in 12 U.S.C. 93, or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 93;

(2) Sections 22 and 23 of the Federal Reserve Act (''FRA''), or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 106(b) of the Bank Holding Company Amendments of 1970, pursuant to 12 U.S.C. 1972(2)(F);

(4) Any provision of the Change in Bank Control Act of 1978 or any regulation or order issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Any provision of the International Lending Supervision Act of 1983 (''ILSA''), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 (''IBA''), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(7) Section 5211 of the Revised Statutes (12 U.S.C. 161), pursuant to 12 U.S.C. 164;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA'') (12 U.S.C. 3349), or any order or regulation issued thereunder;

(10) The terms of any final or temporary order issued under section 8 of the FDIA or any written agreement executed by the OCC or the former Office of Thrift Supervision (OTS), the terms of any condition imposed in writing by the OCC or the former OTS in connection with the grant of an application or request, certain unsafe or unsound practices, breaches of fiduciary duty, or any law or regulation not otherwise provided in this section, pursuant to 12 U.S.C. 1818(i)(2);

(11) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(12) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(13) Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d), (s), and (v);

(14) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d); and

(15) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a(r);

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) for violations of the post-employment restrictions imposed by section 10(k); and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules (see § 19.3(j)).

§ 19.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 19.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary:

(a) *Administrative law judge (ALJ)* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Comptroller* means the Comptroller of the Currency or a person delegated to perform the functions of the Comptroller of the Currency.

(d) *Decisional employee* means any member of the Comptroller's or ALJ's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Comptroller or the ALJ, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(e) *Electronic signature* means electronically affixing the equivalent of a signature to an electronic document filed or transmitted electronically.

(f) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the OCC in an adjudicatory proceeding.

(g) *Final order* means an order issued by the Comptroller with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(h) *Institution* includes any national bank, Federal savings association, or Federal branch or agency of a foreign bank.

(i) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(j) *Local Rules* means those rules promulgated by the OCC in the subparts of this part excluding this subpart.

(k) *OCC* means the Office of the Comptroller of the Currency.

(l) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the OCC, the Board of Governors of the Federal Reserve System (''Board of Governors''), the Federal Deposit Insurance Corporation (''FDIC''), and the National Credit Union Administration (''NCUA'').

(m) *Party* means the OCC and any person named as a party in any notice.

(n) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in paragraph (h) this section.

(o) *Respondent* means any party other than the OCC.

(p) *Uniform Rules* means those rules in this subpart that are common to the

OCC, the Board of Governors, the FDIC, and the NCUA.

(q) *Violation* means any violation as that term is defined in section 3(v) of the FDIA (12 U.S.C. 1813(v)).

§ 19.4 Authority of the Comptroller.

The Comptroller may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the ALJ.

§ 19.5 Authority of the administrative law judge (ALJ).

(a) *General rule.* All proceedings governed by this part must be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The ALJ has all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The ALJ has all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* protective orders, and other orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 19.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Comptroller has the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Comptroller a recommended decision as provided in this part;

(9) To recuse oneself by motion made by a party or on the ALJ's own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of an ALJ.

§ 19.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the OCC or an ALJ*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the OCC if such attorney is not currently suspended or debarred from practice before the OCC.

(2) *By non-attorneys.* An individual may appear on the individual's own behalf.

(3) *Notice of appearance.*—(i) Any individual acting on the individual's own behalf or as counsel on behalf of a party, including the OCC, must file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include:

(A) A written declaration that the individual is currently qualified as provided in paragraphs (a)(1) or (2) of this section and is authorized to represent the particular party; and

(B) A written acknowledgement that the individual has reviewed and will comply with the Uniform Rules and Local Rules in subpart B of this part.

(ii) By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that the counsel is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, the counsel will, if required by the ALJ, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous, or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 19.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice must be signed by at least one counsel of record in the counsel's individual name and must state that counsel's mailing address, electronic mail address, and telephone number. A party who acts as the party's own counsel must sign that person's individual name and state that person's mailing address, electronic mail address, and telephone number on every filing or submission of record. Electronic signatures may be used to satisfy the signature requirements of this section.

(b) *Effect of signature.*—(1) The signature of counsel or a party will constitute a certification that: the counsel or party has read the filing or submission of record; to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the ALJ will strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the counsel's or party's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 19.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person may appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The ALJ may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 19.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might

otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 19.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication. Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the OCC (including such person's counsel); and

(ii) The ALJ handling that proceeding, the Comptroller, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Comptroller until the date that the Comptroller issues a final decision pursuant to § 19.40(c):

(1) An interested person outside the OCC must not make or knowingly cause to be made an *ex parte* communication to the Comptroller, the ALJ, or a decisional employee; and

(2) The Comptroller, ALJ, or decisional employee may not make or knowingly cause to be made to any interested person outside the OCC any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by the ALJ, the Comptroller, or any other person identified in paragraph (a) of this section, that person will cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding may, within ten days of service of the *ex parte* communication, file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The ALJ or the Comptroller then determines whether any action should be taken concerning the *ex parte* communication in accordance with paragraph (d) of this section.

(d) *Sanctions.* Any party or counsel to a party who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Comptroller or the ALJ including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions*—(1) *In general.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the ALJ may not:

(i) Consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or

(ii) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the OCC.

(2) *Decision process.* An employee or agent engaged in the performance of investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 19.40, except as witness or counsel in administrative or judicial proceedings.

§ 19.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 19.25 and 19.26, must be filed with OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Comptroller or the ALJ, filing may be accomplished by:

(1) Electronic mail or other electronic means designated by the Comptroller or the ALJ;

(2) Personal service;

(3) Delivering the papers to a same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, mailing address, electronic mail address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on an 8½ x 11 inch page and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 19.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the OCC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

§ 19.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers must serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party must use one of the following methods of service:

(1) Electronic mail or other electronic means;

(2) Personal service;

(3) Delivering the papers by same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *By the Comptroller or the ALJ.*—(1) All papers required to be served by the Comptroller or the ALJ upon a party who has appeared in the proceeding in accordance with § 19.6 will be served by electronic mail or other electronic means designated by the Comptroller or ALJ.

(2) If a respondent has not appeared in the proceeding in accordance with § 19.6, the Comptroller or the ALJ will serve the respondent by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the respondent;

(iv) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the respondent's last known mailing address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail, delivery by a same day courier service,

or by an overnight delivery service to the person's last known mailing address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved.

§ 19.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.*—(1) Filing and service are deemed to be effective:

(i) In the case of transmission by electronic mail or other electronic means, upon transmittal by the serving party;

(ii) In the case of overnight delivery service or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of personal service or same day courier delivery, upon actual service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Comptroller or ALJ in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by electronic mail or other electronic means or by same day courier delivery, add one calendar day to the prescribed period;

(2) If service is made by overnight delivery service, add two calendar days to the prescribed period; or

(3) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period.

§ 19.13 Change of time limits.

Except as otherwise provided by law, the ALJ may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Comptroller pursuant to § 19.38, the Comptroller may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Comptroller's or the ALJ's own motion.

§ 19.14 Witness fees and expenses.

(a) *In general.* A witness, including an expert witness, who testifies at a deposition or hearing will be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, except as provided in paragraph (b) of this section and unless otherwise waived.

(b) *Exception for testimony by a party.* In the case of testimony by a party, no witness fees or mileage need to be paid. The OCC will not be required to pay any fees to, or expenses of, any witness not subpoenaed by the OCC.

(c) *Timing of payment.* Fees and mileage in accordance with this paragraph (c) must be paid in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the OCC is the party requesting the subpoena.

§ 19.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. Any such offer or proposal may only be made to Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 19.16 OCC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the OCC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the OCC to conduct or continue any form of investigation authorized by law.

§ 19.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 19.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.*—(1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a proceeding governed by this subpart is commenced by issuance of a notice by the Comptroller.

(ii) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law. Enforcement Counsel may serve the notice upon counsel for the respondent, provided that Enforcement Counsel has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent.

(iii) Enforcement Counsel must file the notice with OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Comptroller.

(b) *Contents of notice.* Notice pleading applies. The notice must provide:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) Matters of fact or law showing that the OCC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing must be filed with OFIA.

§ 19.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent must file an answer as designated in the notice. In a civil money penalty proceeding, respondent must also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the respondent lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of the respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the Comptroller a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Comptroller based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order of the Comptroller without further action by the ALJ.

§ 19.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Comptroller or ALJ orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the ALJ may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the ALJ that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The ALJ may grant a continuance to enable the objecting party to meet such evidence.

§ 19.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the ALJ will file with the Comptroller a recommended decision containing the findings and the relief sought in the notice.

§ 19.22 Consolidation and severance of actions.

(a) *Consolidation.*—(1) On the motion of any party, or on the ALJ's own motion, the ALJ may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence, or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The ALJ may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the ALJ finds:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 19.23 Motions.

(a) *In writing.*—(1) Except as otherwise provided in this section, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the ALJ. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the ALJ directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the ALJ, except that following the filing of the recommended decision, motions must be filed with the Comptroller.

(d) *Responses.*—(1) Except as otherwise provided in this section, within ten days after service of any written motion, or within such other period of time as may be established by the ALJ or the Comptroller, any party may file a written response to a motion. The ALJ will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 19.29 and 19.30.

§ 19.24 Scope of document discovery.

(a) *Limits on discovery*—(1) Subject to the limitations set out in paragraphs (b) through (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce

documents, the term *documents* includes writings, drawings, graphs, charts, photographs, recordings, electronically stored information, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party, into a reasonably usable form.

(2) Discovery by use of deposition is governed by subpart I of this part.

(3) Discovery by use of either interrogatories or requests for admission is not permitted.

(4) Any request to produce documents that calls for irrelevant material; or that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, or the time provided to respond in the request is inadequate.

(b) *Relevance.* A party may obtain document discovery regarding any non-privileged matter that has material relevance to the merits of the pending action.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit are permitted, unless the ALJ finds on the record that good cause exists for waiving the requirements of paragraph (d).

§ 19.25 Request for document discovery from parties.

(a) *Document requests.*—(1) Any party may serve on any other party a request to produce and permit the requesting party or its representative to inspect or copy any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. In the case of a request for inspection, the responding party may produce copies of documents or of electronically stored information instead of permitting inspection.

(2) The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected or produced; and

(ii) Must specify a reasonable time, place, and manner for the inspection or production.

(b) *Production or copying*—(1) *General.* Unless otherwise specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories of the request, and electronically stored information must be produced in a form in which it is ordinarily maintained or in a reasonably usable form.

(2) *Costs.* The producing party must pay its own costs to respond to a discovery request, unless otherwise agreed by the parties.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.*—(1) Any party that objects to a discovery request may, within 20 days of being served with such request, file a motion in accordance with the provisions of § 19.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to must be specified. Any objections not made in accordance with paragraph (d)(1) and § 19.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within ten days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, or any other privileges of the Constitution, any applicable act of Congress, or the principles of common law, or are voluminous, these documents may be identified by category instead of by individual document. The ALJ retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.*—(1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 19.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the document request may file a written response to a motion to compel within ten days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the ALJ will rule promptly on all motions filed pursuant to this section. If the ALJ determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, the ALJ may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the ALJ. Notwithstanding any other provision in this part, the ALJ may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the ALJ its intention to file a timely motion for interlocutory review of the ALJ's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the ALJ issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena will not in any manner limit the sanctions that may be imposed by the ALJ against a party who fails to produce subpoenaed documents.

§ 19.26 Document subpoenas to nonparties.

(a) *General rules.*—(1) Any party may apply to the ALJ for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party must specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party may apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 19.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The ALJ will promptly issue any document subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.*—(1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. The motion must be accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 19.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ, which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the ALJ has not quashed or modified. A party's right to seek court enforcement of a document subpoena will in no way limit the sanctions that may be imposed by the ALJ on a party who induces a failure to comply with subpoenas issued under this section.

§ 19.27 Deposition of witness unavailable for hearing.

(a) *General rules.*—(1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the ALJ for the issuance of a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The ALJ may issue a deposition subpoena under this section upon showing:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time, manner, and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the ALJ requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the ALJ orders otherwise, no deposition under this section may be taken on fewer than ten days' notice to the witness and all parties.

(b) *Objections to deposition subpoenas.*—(1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the ALJ to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.*—(1) Each witness testifying pursuant to a deposition subpoena must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Each party must have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the ALJ for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition must certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section, or fails to comply with any order of the ALJ, which directs compliance with all or any portion of a deposition subpoena under paragraphs (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the ALJ on a party who fails to comply with, or procures a failure to

comply with, a subpoena issued under this section.

§ 19.28 Interlocutory review.

(a) *General rule.* The Comptroller may review a ruling of the ALJ prior to the certification of the record to the Comptroller only in accordance with the procedures set forth in this section and § 19.23.

(b) *Scope of review.* The Comptroller may exercise interlocutory review of a ruling of the ALJ if the Comptroller finds:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review must be filed by a party with the ALJ within ten days of the ruling and must otherwise comply with § 19.23. Any party may file a response to a request for interlocutory review in accordance with § 19.23(d). Upon the expiration of the time for filing all responses, the ALJ will refer the matter to the Comptroller for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Comptroller under this section suspends or stays the proceeding unless otherwise ordered by the ALJ or the Comptroller.

§ 19.29 Summary disposition.

(a) *In general.* The ALJ will recommend that the Comptroller issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.*—(1) Any party who believes there is no genuine issue of material fact to be determined and that the party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the ALJ, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends supports the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the written request of any party or on the ALJ's own motion, the ALJ may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the ALJ will determine whether the moving party is entitled to summary disposition. If the ALJ determines that summary disposition is warranted, the ALJ will submit a recommended decision to that effect to the Comptroller. If the ALJ finds that no party is entitled to summary disposition, the ALJ will make a ruling denying the motion.

§ 19.30 Partial summary disposition.

If the ALJ determines that a party is entitled to summary disposition as to certain claims only, the ALJ will defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the ALJ has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 19.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding, the ALJ will direct counsel for all parties to meet with the ALJ at a specified time and manner prior to the hearing for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a ''scheduling conference.'' The schedule for the identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits, and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The ALJ may, in addition to the scheduling conference, on the ALJ's own motion or at the request of any party, direct counsel for the parties to confer with the ALJ at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The ALJ may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at the party's expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the ALJ will serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 19.32 Prehearing submissions.

(a) *Party prehearing submissions.* Within the time set by the ALJ, but in no case later than 20 days before the start of the hearing, each party must file with the ALJ and serve on every other party:

(1) A prehearing statement that states:

(i) The party's position with respect to the legal issues presented;

(ii) The statutory and case law upon which the party relies; and

(iii) The facts that the party expects to prove at the hearing;

(2) A final list of witnesses to be called to testify at the hearing, including the name, mailing address, and electronic mail address of each witness and a short summary of the expected testimony of each witness, which need not identify the exhibits to be relied upon by each witness at the hearing;

(3) A list of the exhibits expected to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 19.33 Public hearings.

(a) *General rule.* All hearings must be open to the public, unless the Comptroller in their discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Comptroller a request for a private hearing, and any party may file a reply to such a request. A party must serve on the ALJ a copy of any request or reply the party files with the Comptroller. The form of, and procedure for, these requests and replies are governed by § 19.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in Enforcement Counsel's discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The ALJ will take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 19.34 Hearing subpoenas.

(a) *Issuance.*—(1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the ALJ may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application must serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the ALJ.

(3) The ALJ will promptly issue any hearing subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the ALJ, the party making the application must serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.*—(1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 19.26(c).

§ 19.35 Conduct of hearings.

(a) *General rules—(1) Conduct of hearings.* Hearings must be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel will present its case-in-chief first, unless otherwise ordered by the ALJ, or unless otherwise expressly specified by law or regulation. Enforcement Counsel will be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the ALJ will fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the ALJ may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the ALJ directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The ALJ may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the ALJ's own motion.

(c) *Electronic presentation.* Based on the circumstances of each hearing, the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If the ALJ requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs, unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

§ 19.36 Evidence.

(a) *Admissibility*—(1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice*—(1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the ALJ or the Comptroller must appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, must be afforded an opportunity to object.

(c) *Documents*—(1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection, or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a State regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the ALJ's discretion, be used with or without being admitted into evidence.

(d) *Objections*—(1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what the examining counsel expected to prove by the expected testimony of the witness either by representation of counsel or by direct questioning of the witness.

(3) The ALJ will retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Comptroller.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses*—(1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the ALJ may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 19.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs*—(1) Using the same method of service for each party, the ALJ will serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the ALJ proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the ALJ or within such longer period as may be ordered by the ALJ.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the ALJ any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The ALJ will not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 19.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 19.37(b), the ALJ will file with and certify to the Comptroller, for decision, the record of the proceeding. The record must include the ALJ's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The ALJ will serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the ALJ files with and certifies to the Comptroller for final determination the record of the proceeding, the ALJ will furnish to the Comptroller a certified index of the entire record of the proceeding. The certified index must include, at a minimum, an entry for each paper, document, or motion filed with the ALJ in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 19.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 19.38, a party may file with the Comptroller written exceptions to the ALJ's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the ALJ to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions*—(1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Comptroller if the party taking exception had an opportunity to raise the same objection, issue, or argument before the ALJ and failed to do so.

(c) *Contents.*—(1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the ALJ's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the ALJ's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 19.40 Review by the Comptroller.

(a) *Notice of submission to the Comptroller.* When the Comptroller determines that the record in the proceeding is complete, the Comptroller will serve notice upon the parties that the proceeding has been submitted to the Comptroller for final decision.

(b) *Oral argument before the Comptroller.* Upon the initiative of the Comptroller or on the written request of any party filed with the Comptroller within the time for filing exceptions, the Comptroller may order and hear oral argument on the recommended findings, conclusions, decision, and order of the ALJ. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Comptroller's final decision. Oral argument before the Comptroller must be on the record.

(c) *Comptroller's final decision*—(1) Decisional employees may advise and assist the Comptroller in the consideration and disposition of the case. The final decision of the Comptroller will be based upon review of the entire record of the proceeding, except that the Comptroller may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Comptroller will render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Comptroller orders that the action or any aspect thereof be remanded to the ALJ for further proceedings. Copies of the final decision and order of the Comptroller will be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Comptroller or required by statute, upon any appropriate State or Federal supervisory authority.

§ 19.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Comptroller may not, unless specifically ordered by the Comptroller or a reviewing court, operate as a stay of any order issued by the Comptroller. The Comptroller may, in its discretion, and on such terms as the Comptroller finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Subpart B—Procedural Rules for OCC Adjudications

§ 19.100 Filing documents.

All materials required to be filed with or referred to the Comptroller or the ALJ in any proceeding under this part must be filed with the OCC Hearing Clerk in a manner prescribed by § 19.10(b) and (c). Filings to be made with the Hearing Clerk include the notice and answer; motions and responses to motions; briefs; the record filed by the ALJ after the issuance of a recommended decision; the recommended decision filed by the ALJ following a motion for summary disposition; referrals by the ALJ of motions for interlocutory review; exceptions and requests for oral argument; any other papers required to be filed with the Comptroller or the ALJ under this part; and any attachments or exhibits to such documents.

§ 19.101 Delegation to OFIA.

Unless otherwise ordered by the Comptroller, an ALJ assigned to OFIA conducts administrative adjudications subject to subpart A of this part.

§ 19.102 Civil money penalties.

A respondent must pay civil money penalties assessed pursuant to subpart A of this part within 60 days after the issuance of the notice of assessment unless the OCC requires a different time for payment. A respondent that has made a timely request for a hearing to challenge the assessment of the penalty is not required to pay the penalty until the OCC has issued a final order of assessment. In these instances, the respondent must pay the penalty within 60 days of service of the order unless the OCC requires a different time for payment.

Subpart C—Removals, Suspensions, and Prohibitions of an Institution-Affiliated Party When a Crime Is Charged or a Conviction Is Obtained

§ 19.110 Scope and definitions.

(a) *Scope.* This subpart applies to informal hearings afforded to any institution-affiliated party who has been suspended or removed from office or prohibited from further participation in the affairs of any depository institution pursuant to section 8(g) of the FDIA (12 U.S.C. 1818(g)) by a notice or order issued by the Comptroller.

(b) *Definitions.* As used in this subpart—

(1) The term *petitioner* means an individual who has filed a petition for an informal hearing under this subpart.

(2) The term *depository institution* means any national bank, Federal savings association, or Federal branch or agency of a foreign bank.

(3) The term *OCC Supervisory Office* means the Senior Deputy Comptroller or Deputy Comptroller of the OCC department or office responsible for supervision of the depository institution or, in the case of an individual no longer affiliated with a particular depository institution, the Deputy Comptroller for Special Supervision.

§ 19.111 Suspension, removal, or prohibition of institution-affiliated party.

(a) *Issuance of notice or order.* The Comptroller may serve a notice of suspension or prohibition or order of removal or prohibition pursuant to section 8(g) of the FDIA (12 U.S.C. 1818(g)) on an institution-affiliated party. The Comptroller will serve a copy of this notice or order on any depository institution that the subject of the notice or order is affiliated with at the time the OCC issues the notice or order. After service of the notice or order, the institution-affiliated party must immediately cease service to, or participation in the affairs of, that depository institution and, if so determined by the OCC, any other depository institution. The notice or order will indicate the basis for suspension, removal, or prohibition and will inform the institution-affiliated party of the right to request in writing, within 30 days from the date that the institution-affiliated party was served, an opportunity to show at an informal hearing that continued service to or participation in the conduct of the affairs of any depository institution has not posed, does not pose, or is not likely to pose a threat to the interests of the

depositors of, or has not threatened, does not threaten, or is not likely to threaten to impair public confidence in, any relevant depository institution. The Comptroller will serve the notice or order upon the institution-affiliated party and the related institution in the manner set forth in § 19.11(c).

(b) *Request for hearing*—(1) *Submission.* Unless instructed otherwise in writing by the Comptroller, an institution-affiliated party must send the written request for an informal hearing referenced in paragraph (a) of this section to the OCC Supervisory Office by certified mail, a same day courier service, an overnight delivery service, or by personal service with a signed receipt.

(2) *Content of request for a hearing.* The request filed under this section must state specifically the relief desired and the grounds on which that relief is based and must admit, deny, or state that the institution-affiliated party lacks sufficient information to admit or deny each allegation in the notice or order. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation denied; general denials are not permitted. When the institution-affiliated party denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation in the notice or order which is not denied is deemed admitted for purposes of the proceeding. The request must state with particularity how the institution-affiliated party intends to show that its continued service to or participation in the affairs of the institution would not pose a threat to the interests of the institution's depositors or impair public confidence in any institution.

(c) *Default.* If the institution-affiliated party fails to timely file a petition for a hearing pursuant to paragraph (b) of this section, or fails to appear at a hearing, either in person or by counsel, or fails to submit a written argument where oral argument has been waived pursuant to § 19.112(c), the notice will remain in effect until the information, indictment, or complaint is finally disposed of and the order will remain in effect until terminated by the OCC.

§ 19.112 Informal hearing.

(a) *Issuance of hearing order.* After receipt of a request for hearing, the OCC Supervisory Office must notify the petitioner requesting the hearing and OCC Enforcement of the date, time, and place fixed for the hearing. The OCC will hold the hearing no later than 30 days from the date when the OCC receives the request for a hearing, unless the time is extended in response to a written request of the petitioner. The OCC Supervisory Office may extend the hearing date only for a specific period of time and must take appropriate action to ensure that the hearing is not unduly delayed.

(b) *Appointment of presiding officer.* The OCC Supervisory Office must appoint one or more OCC employees as the presiding officer to conduct the hearing. The presiding officer(s) may not have been involved in a prosecutorial or investigative role in the proceeding, a factually related proceeding, or the underlying enforcement action.

(c) *Waiver of oral hearing*—(1) *Petitioner.* When the petitioner requests a hearing, the petitioner may elect to have the matter determined by the presiding officer solely on the basis of written submissions by serving on the OCC Supervisory Office and all parties a signed document waiving the statutory right to appear and make oral argument. The petitioner must present the written submissions to the presiding officer and serve the other parties not later than ten days prior to the date fixed for the hearing or within a shorter time period as the presiding officer may permit.

(2) *OCC.* The OCC may respond to the petitioner's submissions by presenting the presiding officer with a written response and by serving the other parties in the manner prescribed by § 19.11(c) not later than the date fixed for the hearing or within such other time period as the presiding officer may require.

(d) *Hearing procedures*—(1) *Conduct of hearing.* Hearings under this subpart are not subject to the provisions of subpart A of this part or the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 554–557).

(2) *Powers of the presiding officer.* The presiding officer must determine all procedural issues that are governed by this subpart. The presiding officer also may permit witnesses, limit the number of witnesses, and impose time limitations as they deem reasonable. The informal hearing will not be governed by formal rules of evidence, including the Federal Rules of Evidence. The presiding officer must consider all oral presentations, when permitted, and all documents the presiding officer deems to be relevant and material to the proceeding and not unduly repetitious. The presiding officer may ask questions of any person participating in the hearing and may make any rulings reasonably necessary to facilitate the effective and efficient operation of the hearing.

(3) *Presentation.* (i) The OCC and the petitioner may present relevant written materials and oral argument at the hearing. The petitioner may appear at the hearing personally or through counsel. Except as permitted in paragraph (c) of this section, each party, including the OCC, must file a copy of any affidavit, memorandum, or other written material to be presented at the hearing with the presiding officer and must serve the other parties not later than ten days prior to the hearing or within such shorter time period as permitted by the presiding officer.

(ii) If the petitioner or the OCC desires to present oral testimony or witnesses at the hearing, they must file a written request with the presiding officer not later than ten days prior to the hearing, or within a shorter time period as required by the presiding officer. The written request must include the names of proposed witnesses, along with the general nature of the expected testimony, and the reasons why oral testimony is necessary. The presiding officer generally will not admit oral testimony or witnesses unless a specific and compelling need is demonstrated. Witnesses, if admitted, must be sworn. By stipulation of the parties or by order of the presiding officer, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the witness.

(iii) In deciding on any suspension or prohibition based on an indictment, information, or complaint, the presiding officer may not consider the ultimate question of the guilt or innocence of the individual with respect to the criminal charges that are outstanding. In deciding on any removal or prohibition with respect to a conviction or pre-trial diversion program, the presiding officer may not consider challenges to or efforts to impeach the validity of the conviction or the agreement to enter a pre-trial diversion program or other similar program. The presiding officer may consider facts in either situation, however, that show the nature of the events on which the criminal charges, conviction, or agreement to enter a pre-trial diversion program or other similar program was based.

(4) *Electronic presentation.* Based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs unless the parties agree to another

manner by which to allocate presentation responsibilities and costs.

(5) *Record.* A transcript of the proceedings may be taken if the petitioner requests a transcript and agrees to pay all expenses or if the presiding officer determines that the nature of the case warrants a transcript. The presiding officer may order the record to be kept open for a reasonable period following the hearing, not to exceed five business days, to permit the petitioner or the OCC to submit additional documents for the record. Thereafter, no further submissions may be accepted except for good cause shown.

§ 19.113 Recommended and final decisions.

(a) *Issuance of recommended decision.* The presiding officer must issue a recommended decision to the Comptroller within 20 days of the conclusion of the hearing or, when the petitioner has waived an oral hearing, within 20 days of the date fixed for the hearing. The presiding officer must serve promptly a copy of the recommended decision on the parties to the proceeding. The decision must include a summary of the facts and arguments of the parties.

(b) *Comments.* Each party may, within ten days of being served with the presiding officer's recommended decision, submit to the Comptroller comments on the recommended decision.

(c) *Issuance of final decision.* Within 60 days of the conclusion of the hearing or, if the petitioner has waived an oral hearing, within 60 days from the date fixed for the hearing, the Comptroller will notify the petitioner by registered mail, or electronic mail or other electronic means if the petitioner consents, whether the suspension or removal from office or prohibition from participation in any manner in the affairs of any depository institution will be affirmed, terminated, or modified. The Comptroller's decision must include a statement of reasons supporting the decision. The Comptroller's decision is a final and unappealable order.

(d) *Other actions.* A finding of not guilty or other disposition of the charge or charges on which a notice of suspension was based does not preclude the Comptroller from thereafter instituting removal proceedings pursuant to section 8(e) of the FDIA (12 U.S.C. 1818(e)) and subpart A of this part.

(e) *Expiration of order.* A removal or prohibition by order remains in effect until terminated by the Comptroller. A suspension or prohibition by notice remains in effect until the criminal charge is disposed of or until terminated by the Comptroller.

(f) *Petition for reconsideration.* A suspended or removed individual may petition the Comptroller to reconsider the decision any time after the expiration of a 12-month period from the date of the decision, but no petition for reconsideration may be made within 12 months of a previous petition. The petition must state specifically the relief sought and the grounds therefor, and may be accompanied by a supporting memorandum and any other documentation the petitioner wishes to have considered. The Comptroller is not required to grant a hearing on the petition for reconsideration.

Subpart D—Actions Under the Federal Securities Laws

§ 19.120 Exemption hearings under section 12(h) of the Securities Exchange Act of 1934.

(a) *Scope.* The rules in this section apply to informal hearings that may be held by the Comptroller to determine whether, pursuant to authority in sections 12(h) and (i) of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78*l*(h) and (i)), to exempt in whole or in part an issuer or a class of issuers from the provisions of section 12(g), or from section 13 or 14 of the Exchange Act (15 U.S.C. 78*l*(g), 78m or 78n), or whether to exempt from section 16 of the Exchange Act (15 U.S.C. 78p) any officer, director, or beneficial owner of securities of an issuer. The only issuers covered by this section are national banks and Federal savings associations whose securities are registered, or which may be subject to registration, pursuant to section 12(g) of the Exchange Act (15 U.S.C. 78*l*(g)). The Comptroller may deny an application for exemption without a hearing.

(b) *Application for exemption.* An issuer or an individual (officer, director, or shareholder) may submit a written application for an exemption order to Bank Advisory, Office of the Comptroller of the Currency, Washington, DC 20219. The application must specify the type of exemption sought and the reasons for the exemption, including an explanation of why an exemption would not be inconsistent with the public interest or the protection of investors. Bank Advisory will inform the applicant in writing whether a hearing will be held to consider the matter.

(c) *Newspaper notice.* Upon being informed that an application will be considered at a hearing, the applicant must publish a notice one time in a newspaper of general circulation in the community where the issuer's main office is located. The notice must state: The name and title of any individual applicants; the type of exemption sought; the fact that a hearing will be held; and a statement that interested persons may submit to Bank Advisory, Office of the Comptroller of the Currency, Washington, DC 20219 within 30 days from the date of the newspaper notice, written comments concerning the application and a written request for an opportunity to be heard. The applicant must promptly provide a copy of the notice to Bank Advisory and to the national bank's or Federal savings association's shareholders in the same manner as is customary for shareholder communications.

(d) *Informal hearing*—(1) *Conduct of proceeding.* The adjudicative provisions of the Administrative Procedure Act, formal rules of evidence, and subpart A of this part do not apply to hearings conducted under this section, except as provided in § 19.100.

(2) *Notice of hearing.* Following the comment period, the Comptroller will send a notice that fixes a date, time, and place for hearing to each applicant and to any person who has requested an opportunity to be heard.

(3) *Presiding officer.* The Comptroller will designate a presiding officer to conduct the hearing. The presiding officer must determine all procedural questions not governed by this section and may limit the number of witnesses and impose time and presentation limitations as are deemed reasonable. At the conclusion of the informal hearing, the presiding officer must issue a recommended decision to the Comptroller as to whether the exemption should be issued. The decision must include a summary of the facts and arguments of the parties.

(4) *Attendance.* Each applicant and any person who has requested an opportunity to be heard may attend the hearing with or without counsel. The hearing will be open to the public. In addition, each applicant and any other hearing participant may introduce oral testimony through such witnesses as the presiding officer may permit.

(5) *Order of presentation.* (i) Each applicant may present an opening statement of a length decided by the presiding officer. Each of the hearing participants, or one among them selected with the approval of the presiding officer, may then present an opening statement. The opening statement should summarize concisely what each applicant and participant intends to show.

(ii) Each applicant will have an opportunity to make an oral presentation of facts and materials or submit written materials for the record. One or more of the hearing participants may make an oral presentation or a written submission.

(iii) After the above presentations, each applicant, followed by one or more of the hearing participants, may make concise summary statements reviewing their position.

(6) *Witnesses.* The obtaining and use of witnesses is the responsibility of the parties afforded the hearing. All witnesses must be present on their own volition, but any person appearing as a witness may be questioned by each applicant, any hearing participant, and the presiding officer. Witnesses must be sworn unless otherwise directed by the presiding officer. By stipulation of the parties or by order of the presiding officer, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the witness.

(7) *Evidence.* The presiding officer may exclude data or materials deemed to be improper or irrelevant. Formal rules of evidence do not apply. Documentary material must be of a size consistent with ease of handling and filing. The presiding officer may determine the number of copies that must be furnished for purposes of the hearing.

(8) *Electronic presentation.* Based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

(9) *Transcript.* The OCC will arrange a transcript of each proceeding with all expenses, including the furnishing of a copy to the presiding officer by electronic means or otherwise, paid by the applicant or applicants.

(e) *Decision of the Comptroller.* Following the conclusion of the hearing and the submission of the record and the presiding officer's recommended decision to the Comptroller for decision, the Comptroller will notify each applicant and all persons who have so requested in writing of the final disposition of the application. Exemptions granted must be in the form of an order that specifies the type of exemption granted and its terms and conditions.

§ 19.121 Disciplinary proceedings.

(a) *Scope*—(1) *In general.* Except as provided in this section, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 15B(c)(5), 15C(c)(2)(A), 17A(c)(3), and 17A(c)(4)(C) of the Exchange Act (15 U.S.C. 78o–4(c)(5), 78o–5(c)(2)(A), 78q–1(c)(3)(A), and 78q–1(c)(4)(C)), to take disciplinary action against the following:

(i) A bank that is a municipal securities dealer, any person associated with a bank that is a municipal securities dealer, or any person seeking to become associated with a bank that is a municipal securities dealer;

(ii) A bank that is a government securities broker or government securities dealer, any person associated with a bank that is a government securities broker or government securities dealer, or any person seeking to become associated with a government securities broker or government securities dealer; or

(iii) A bank that is a transfer agent, any person associated with a bank that is a transfer agent, or any person seeking to become associated with a bank that is a transfer agent.

(2) *Other actions.* In addition to the issuance of disciplinary orders after opportunity for hearing, the Comptroller may issue and serve any notices and temporary or permanent cease-and-desist orders and take any actions that are authorized by section 8 of the FDIA (12 U.S.C. 1818); sections 15B(c)(5), 15C(c)(2)(B), and 17A(d)(2) of the Exchange Act (15 U.S.C. 78o–4(c)(5), 78o–5(c)(2)(B), and 78q–1(d)(2)); and other sections of this part against the following:

(i) The parties listed in paragraph (a)(1) of this section; and

(ii) A bank that is a clearing agency.

(3) *Definitions.* As used in this section:

(i) The term *bank* means a national bank or Federal savings association, and, when referring to a government securities broker or government securities dealer, a Federal branch or agency of a foreign bank;

(ii) The terms *transfer agent, municipal securities dealer, government securities broker,* and *government securities dealer* have the same meaning as the terms in sections 3(a)(25), 3(a)(30), 3(a)(43), and 3(a)(44) of the Exchange Act (15 U.S.C. 78c(a)(25), 78c(a)(30), 78c(a)(43), and 78c(a)(44)), respectively;

(iii) The terms *person associated with a bank that is a municipal securities dealer* and *person associated with a municipal securities dealer* have the same meaning as *person associated with a municipal securities dealer* in section 3(a)(32) of the Exchange Act (15 U.S.C. 78c(a)(32));

(iv) The terms *person associated with a bank that is a government securities broker or government securities dealer* and *person associated with a government securities broker or government securities dealer* have the same meaning as *person associated with a government securities broker or government securities dealer* in section 3(a)(45) of the Exchange Act (15 U.S.C. 78c(a)(45)); and

(v) The terms *person associated with a bank that is a transfer agent* and *person associated with a transfer agent* have the same meaning as *person associated with a transfer agent* in section 3(a)(49) of the Exchange Act (15 U.S.C. 78c(a)(49)).

(4) *Preservation of authority.* Nothing in this section impairs the powers conferred on the Comptroller by other provisions of law.

(b) *Notice of charges and answer*—(1) *In general.* Proceedings are commenced when the Comptroller serves a notice of charges on a bank or associated person. The notice must indicate the type of disciplinary action being contemplated and the grounds therefor and fix a date, time, and place for hearing. The hearing must be set for a date at least 30 days after service of the notice. A respondent served with a notice of charges may file an answer as prescribed in § 19.19. Any respondent who fails to appear at a hearing personally or by a duly authorized representative is deemed to have consented to the issuance of a disciplinary order.

(2) *Public basis of proceedings; private hearings.* All proceedings under this section must be commenced, and the notice of charges must be filed, on a public basis unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), a request for a private hearing may be filed within 20 days of service of the notice.

(c) *Disciplinary orders*—(1) *Service of order; content.* In the event of consent, or if on the record filed by the ALJ, the Comptroller finds that any act or omission or violation specified in the notice of charges has been established, the Comptroller may serve on the bank or persons concerned a disciplinary order, as provided in the Exchange Act. The order may:

(i) Censure; limit the activities, functions, or operations of; or suspend or revoke the registration of a bank that is a municipal securities dealer;

(ii) Censure, suspend, or bar any person associated with a municipal securities dealer or seeking to become a

person associated with a municipal securities dealer;

(iii) Censure; limit the activities, functions, or operations of; or suspend or bar a bank that is a government securities broker or government securities dealer;

(iv) Censure; limit the activities, functions, or operations of; or suspend or bar any person associated with or seeking to become a person associated with a government securities broker or government securities dealer;

(v) Deny registration to; limit the activities, functions, or operations of; or suspend or revoke the registration of a bank that is a transfer agent; or

(vi) Censure, limit the activities or functions of, or suspend or bar any person associated with a transfer agent or seeking to become a person associated with a transfer agent.

(2) *Effective date of order.* A disciplinary order is effective when served on the respondent or respondents involved and remains effective and enforceable until it is stayed, modified, terminated, or set aside by action of the Comptroller or a reviewing court.

(d) *Applications for stay or review of disciplinary actions imposed by registered clearing agencies*—(1) *Stays.* The rules adopted by the Securities and Exchange Commission (SEC) pursuant to section 19 of the Exchange Act (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for stays of disciplinary sanctions or summary suspensions imposed by registered clearing agencies (17 CFR 240.19d–2) apply to applications by banks. References to the ''Commission'' are deemed to refer to the ''OCC.''

(2) *Reviews.* The regulations adopted by the SEC pursuant to section 19 of the Exchange Act (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for reviews of final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by registered clearing agencies (17 CFR 240.19d–3(a) through (f)) apply to applications by banks. References to the ''Commission'' are deemed to refer to the ''OCC.''

§ 19.122 Civil money penalty authority under Federal securities laws.

(a) *Scope.* Except as provided in this section, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in section 21B of the Exchange Act (15 U.S.C. 78u–2), in proceedings commenced pursuant to sections 15B, 15C, and 17A of the Exchange Act (15 U.S.C. 78o–4, 78o–5, or 78q–1) for which the OCC is the appropriate regulatory agency under section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)), the Comptroller may impose a civil money penalty against the following:

(1) A bank that is a municipal securities dealer, any person associated with a bank that is a municipal securities dealer, or any person seeking to become associated with a bank that is a municipal securities dealer;

(2) A bank that is a government securities broker or government securities dealer, any person associated with a bank that is a government securities broker or government securities dealer, or any person seeking to become associated with a government securities broker or government securities dealer; or

(3) A bank that is a transfer agent, any person associated with a bank that is a transfer agent, or any person seeking to become associated with a bank that is a transfer agent.

(b) *Definitions.* As used in this section:

(1) The term *bank* means a national bank or Federal savings association, and, when referring to a government securities broker or government securities dealer, a Federal branch or agency of a foreign bank;

(2) The terms *transfer agent, municipal securities dealer, government securities broker,* and *government securities dealer* have the same meaning as such terms in sections 3(a)(25), 3(a)(30), 3(a)(43), and 3(a)(44) of the Exchange Act (15 U.S.C. 78c(a)(25), 78c(a)(30), 78c(a)(43), and 78c(a)(44)), respectively;

(3) The term *person associated with a bank that is a municipal securities dealer* has the same meaning as *person associated with a municipal securities dealer* in section 3(a)(32) of the Exchange Act (15 U.S.C. 78c(a)(32));

(4) The term *person associated with a bank that is a government securities broker or government securities dealer* has the same meaning as *person associated with a government securities broker or government securities dealer* in section 3(a)(45) of the Exchange Act (15 U.S.C. 78c(a)(45)); and

(5) The term *person associated with a bank that is a transfer agent* has the same meaning as *person associated with a transfer agent* in section 3(a)(49) of the Exchange Act (15 U.S.C. 78c(a)(49)).

(c) *Public basis of proceedings; private hearings.* All proceedings under this section must be commenced, and the notice of assessment must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing may be filed within 20 days of service of the notice.

§ 19.123 Cease-and-desist authority.

(a) *Scope.* Except as provided in this section, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 12(i) and 21C of the Exchange Act (15 U.S.C. 78*l*(i) and 78u–3), the Comptroller may initiate cease-and-desist proceedings against a national bank or Federal savings association for violations of sections 10A(m), 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act (15 U.S.C. 78j–1(m), 78*l,* 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p); sections 302, 303, 304, 306, 401(b), 404, 406, and 407 of the Sarbanes-Oxley Act of 2002 as amended (15 U.S.C. 7241, 7242, 7243, 7244, 7261, 7262, 7264, and 7265); or regulations or rules issued thereunder.

(b) *Public basis of proceedings; private hearings.* All proceedings under this section must be commenced, and the notice of charges must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing may be filed within 20 days of service of the notice.

Subparts E through G—Reserved

Subpart H—Change in Bank Control

§ 19.160 Scope.

(a) *Scope.* This subpart governs the procedures for a hearing requested by a person who has filed a notice that has been disapproved by the OCC for a change in control of:

(1) An insured national bank or Federal savings association pursuant to section 7(j) of the FDIA (12 U.S.C. 1817(j)) and 12 CFR 5.50; or

(2) An uninsured national bank pursuant to 12 CFR 5.50.

(b) *Applicability of subpart A of this part.* Unless otherwise provided in this subpart, the rules in subpart A set forth the procedures applicable to requests for OCC hearings under this subpart.

§ 19.161 Hearing process.

(a) *Hearing request.* Pursuant to 12 CFR 5.50(f)(6), following receipt of a notice of disapproval of a proposed acquisition of control of a national bank or Federal savings association, a filer may request a hearing by the OCC on the proposed acquisition. A hearing request must:

(1) Be in writing; and

(2) Be filed with the Hearing Clerk of the OCC within ten days after service on the filer of the notice of disapproval. If

a filer fails to request a hearing with a timely written request, the notice of disapproval constitutes a final and unappealable order.

(b) *Hearing order.* Following receipt of a hearing request, the Comptroller will issue, within 20 days, an order that sets forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) The matters of fact or law upon which the disapproval is based; and

(3) The requirement for filing an answer to the hearing order with OFIA within 20 days after service of the hearing order.

(c) *Answer.* An answer to a hearing order must specifically deny those portions of the order that are disputed. Those portions of the order that the filer does not specifically deny are deemed admitted by the filer. Any hearing under this subpart is limited to those portions of the order that are specifically denied.

(d) *Effect of failure to answer.* Failure of a filer to file an answer within 20 days after service of the hearing order constitutes a waiver of the filer's right to appear and contest the allegations in the hearing order. If a filer does not file a timely answer, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the Comptroller a recommended decision containing the findings and the relief sought in the hearing order. Any final order issued by the Comptroller based upon a filer's failure to answer is deemed to be an order issued upon consent and is a final and unappealable order.

Subpart I—Discovery Depositions and Subpoenas

§ 19.170 Discovery depositions.

(a) *In general.* In any proceeding instituted under or subject to the provisions of subpart A of this part, a party may take the deposition of a fact witness, an expert, or a hybrid fact-expert where there is need for the deposition. A fact witness is a person, including another party, who has direct knowledge of matters that are non-privileged and of material relevance to the proceeding. A hybrid fact-expert witness is a fact witness who will also provide relevant expert opinion testimony based on the witness' training and experience. The deposition of experts is limited to those experts who are expected to testify at the hearing.

(1) *Report.* A party must produce an expert report for any testifying expert or hybrid fact-expert witness before the witness' deposition. Unless otherwise provided by the ALJ, the party must produce this report at least 20 days prior to any deposition of the expert or hybrid fact-expert witness.

(2) *Limits on depositions.* Respondents, collectively, are limited to a combined total of five depositions from fact witnesses and hybrid fact-expert witnesses. Enforcement Counsel are limited to a combined total of five depositions from fact witnesses and hybrid fact-expert witnesses. A party is entitled to take a deposition of each expert witness designated by an opposing party.

(b) *Notice.* A party desiring to take a deposition must give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time, manner, and place for taking the deposition, and the name and address of the person to be deposed.

(1) *Location.* A deposition notice may require the witness to be deposed at any place within a State, territory, or possession of the United States or the District of Columbia in which that witness resides or has a regular place of employment, or such other convenient place as agreed by the noticing party and the witness.

(2) *Remote participation.* The parties may stipulate, or the ALJ may order, that a deposition be taken by telephone or other remote means.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than 20 days before the scheduled hearing date, except with permission of the ALJ for good cause shown.

(d) *Conduct of the deposition.* The witness must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Each party will have the right to examine the witness with respect to all matters that are non-privileged and of material relevance to the proceeding and of which the witness has factual, direct, and personal knowledge. Objections to questions or exhibits must be in short form and must state the grounds for the objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented.

(e) *Recording the testimony*—(1) *Generally.* The party taking the deposition must have a certified court reporter record the witness' testimony:

(i) By stenotype machine or electronic means, such as by sound or video recording device;

(ii) Upon agreement of the parties, by any other method; or

(iii) For good cause and with leave of the ALJ, by any other method.

(2) *Cost.* The party taking the deposition must bear the cost of recording and transcribing the witness' testimony.

(3) *Transcript.* Unless the parties agree that a transcription is not necessary, the court reporter must provide a transcript of the witness' testimony to the party taking the deposition and must make a copy of the transcript available to each party upon payment by that party of the cost of the copy.

(f) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The ALJ may grant a protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, irrelevant, or immaterial matters;

(3) Involves unwarranted attempts to pry into a party's preparation for trial; or

(4) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the witness.

(g) *Expenses.* Deposition witnesses, including expert witnesses, must be paid the same expenses in the same manner as are paid witnesses in the district courts of the United States in proceedings in which the United States is a party. Expenses in accordance with this paragraph (g) must be paid by the party seeking to take the deposition.

§ 19.171 Deposition subpoenas.

(a) *Issuance.* At the request of a party, the ALJ may issue a subpoena requiring the attendance of a witness at a discovery deposition under § 19.170. The attendance of a witness may be required from any place in any State, territory, or possession of the United States or the District of Columbia or as otherwise permitted by law.

(b) *Service*—(1) *Methods of service.* The party requesting the subpoena must serve it on the person named therein, or on that person's counsel, by any of the methods identified in § 19.11(d).

(2) *Proof of service.* The party serving the subpoena must file proof of service

with the ALJ, unless the ALJ issues an order indicating the filing of proof of service is not required.

(c) *Motion to quash.* A person named in a subpoena, or any party, may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party that requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(d) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena must be in accordance with the procedures of § 19.27(d).

Subpart J—Formal Investigations

§ 19.180 Scope.

This subpart and § 19.8 apply to formal investigations initiated by order of the Comptroller and pertain to the exercise of powers specified in section 5240 of the Revised Statutes of the United States (12 U.S.C. 481); section 5(d)(1)(B) of the Home Owners' Loan Act (12 U.S.C. 1464(d)(1)(B)); sections 7(j)(15), 8(n), and 10(c) of the FDIA (12 U.S.C. 1817(j)(15), 1818(n), and 1820(c)); sections 4(b) and 13(a) and (b) of the International Banking Act of 1978 (12 U.S.C. 3102(b) and 3108(a) and (b)); and section 21 of the Exchange Act (15 U.S.C. 78u). This subpart does not restrict or in any way affect the authority of the Comptroller to conduct examinations into the affairs or ownership of national banks, Federal savings associations, Federal branches and agencies, and their affiliates.

§ 19.181 Confidentiality of formal investigations.

The entire record of any formal investigative proceeding, including the resolution or order of the Comptroller authorizing or terminating the proceeding; all subpoenas issued by the OCC during the investigation; and all information, documents, and transcripts obtained by the OCC in the course of a formal investigation, are confidential and may be disclosed only in accordance with the provisions of part 4 of this chapter or pursuant to OCC discovery obligations under subpart A of this part.

§ 19.182 Order to conduct a formal investigation.

A formal investigation begins with the issuance of an order signed by the Comptroller. The order must designate the person or persons empowered by the Comptroller to conduct the investigation. These persons are authorized, among other things, to administer oaths and affirmations, to take or cause to be taken testimony under oath, and to issue or modify subpoenas, including subpoenas *duces tecum,* as to any matter under investigation by the Comptroller. Upon application and for good cause shown, the Comptroller may limit, modify, withdraw, or terminate the order at any stage of the proceedings.

§ 19.183 Rights of witnesses.

(a) *Right to be shown order.* Any person who is compelled or requested to furnish testimony, documentary evidence, or other information with respect to any matter under formal investigation must, on request, be shown the order initiating the investigation. These persons may not retain copies of the order without first receiving written approval of the OCC.

(b) *Right to counsel.* Any person who, in a formal investigation, is compelled to appear and testify, or who appears and testifies by request or permission of the OCC, may be accompanied, represented, and advised by counsel. The right to be accompanied, represented, and advised by counsel means the right of a person testifying to have an attorney present at all times while testifying and to have the attorney:

(1) Advise the person before, during, and after the conclusion of testimony;

(2) Question the person, on the record, briefly at the conclusion of testimony for the purpose of clarifying any of the answers given; and

(3) Make summary notes during the testimony solely for use in representing the person.

(c) *Exclusion from proceedings.* Any person who has given or will give testimony and counsel representing the person may be excluded from the proceedings during the taking of testimony of any other person at the discretion of the OCC or the OCC's designated representatives. Neither attorney(s) for the institution(s) affiliated with the testifying person nor attorneys for any other interested persons have any right to be present during the testimony of any person not personally represented by such attorney.

(d) *Right to inspect testimony transcript.* Any person who is compelled to give testimony is entitled to inspect any transcript that has been made of the testimony but may not obtain a copy if the OCC or the OCC's designated representatives conducting the proceedings determine that the contents should not be disclosed.

§ 19.184 Service of subpoena and payment of witness expenses.

(a) *Methods of service.* Service of a subpoena may be made by any of the methods identified in § 19.11(d).

(b) *Expenses.* The fees and expenses specified in § 19.14 apply to a witness who is subpoenaed to testify pursuant to this subpart.

(c) *Area of service.* Subpoenas issued in connection with a formal investigation proceeding that require the attendance and testimony of witnesses or the production of documents, including electronically stored information, may be served on any person or entity within any State, territory, or possession of the United States or the District of Columbia, or as otherwise provided by law. Foreign nationals are subject to such subpoenas if service is made upon a duly authorized agent located in the United States or in accordance with international requirements for service of subpoenas.

§ 19.185 Dilatory, obstructionist, or insubordinate conduct.

Any OCC designated representative conducting an investigative proceeding will report to the Comptroller any instances where any person has engaged in dilatory, obstructionist, or insubordinate conduct during the course of the proceeding or any other instance involving a violation of this part. The Comptroller may take such action as the circumstances warrant, including exclusion of the offending individual or individuals from participation in the proceedings.

Subpart K—Parties and Representational Practice Before the OCC; Standards of Conduct

§ 19.190 Scope.

This subpart contains rules relating to parties and representational practice before the OCC. This subpart includes the imposition of sanctions by the ALJ, any other presiding officer appointed pursuant to subpart C of this part and § 19.120, or the Comptroller against parties or their counsel in an adjudicatory proceeding under this part. This subpart also covers other disciplinary sanctions—censure, suspension, or debarment—against individuals who appear before the OCC in a representational capacity either in an adjudicatory proceeding under this part or in any other matters connected with presentations to the OCC relating to a client's rights, privileges, or liabilities. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees

of the OCC are not subject to disciplinary proceedings under this subpart.

§ 19.191 Definitions.

As used in §§ 19.190 through 19.201, the following terms have the meaning given in this section unless the context otherwise requires:

(a) *Accountant* means any individual who is duly qualified to practice as a certified public accountant or a public accountant in any state, possession, territory, or commonwealth of the United States or the District of Columbia.

(b) *Attorney* means any individual who is a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States or the District of Columbia.

(c) *Practice before the OCC* includes any matters connected with written or oral presentations to the OCC or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the OCC. Such matters include, but are not limited to, representation of a client in an adjudicatory proceeding under this part; the preparation of any statement, opinion or other paper or document by an attorney, accountant, or other licensed professional that is filed with, or submitted to, the OCC, on behalf of another person in, or in connection with, any application, notification, report or document; the representation of a person at conferences, hearings and meetings; and the transaction of other business before the OCC on behalf of another person. The term *practice before the OCC* does not include work prepared for a national bank, Federal savings association, or Federal branch or agency of a foreign bank solely at its request for use in the ordinary course of its business.

§ 19.192 Sanctions relating to conduct in an adjudicatory proceeding.

(a) *In general.* Appropriate sanctions may be imposed when any party or person representing a party in an adjudicatory proceeding under this part has failed to comply with an applicable statute, regulation, or order, and that failure to comply:

(1) Constitutes contemptuous conduct;

(2) Materially injures or prejudices another party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Unduly delays the proceeding.

(b) *Sanctions.* Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that are just; and

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Procedure for imposition of sanctions.* (1) Upon the motion of any party, or on their own motion, the ALJ or other presiding officer may impose sanctions in accordance with this section. The ALJ or other presiding officer will submit to the Comptroller for final ruling any sanction entering a final order that determines the case on the merits.

(2) No sanction authorized by this section, other than refusal to accept late filings, will be imposed without prior notice to all parties and an opportunity for any party against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form as the ALJ or other presiding officer directs. The ALJ or other presiding officer may limit the opportunity to be heard to an opportunity of a party or a party's representative to respond orally immediately after the act or inaction covered by this section is noted by the ALJ or other presiding officer.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, are subject to interlocutory review pursuant to § 19.25 in the same manner as any other ruling.

(d) *Section not exclusive.* This section does not preclude the ALJ or other presiding officer or the Comptroller from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

§ 19.193 Censure, suspension, or debarment.

The Comptroller may censure an individual or suspend or debar an individual from practice before the OCC if the individual is incompetent in representing a client's rights or interest in a significant matter before the OCC; or engages, or has engaged, in disreputable conduct; or refuses to comply with the rules and regulations in this part; or with intent to defraud in any manner, willfully and knowingly deceives, misleads, or threatens any client or prospective client. The suspension or debarment of an individual may be initiated only upon a finding by the Comptroller that the basis for the disciplinary action is sufficiently egregious.

§ 19.194 Eligibility of attorneys and accountants to practice.

(a) *Attorneys.* Any attorney not currently under suspension or debarment pursuant to this subpart may practice before the OCC.

(b) *Accountants.* Any accountant not currently under suspension or debarment by the OCC may practice before the OCC.

§ 19.195 Incompetence.

Incompetence in the representation of a client's rights and interests in a significant matter before the OCC is grounds for suspension or debarment. The term ''incompetence'' encompasses conduct that reflects a lack of the knowledge, judgment, and skill that a professional would ordinarily and reasonably be expected to exercise in adequately representing the rights and interests of a client. Such conduct includes, but is not limited to:

(a) Handling a matter that the individual knows or should know that they are not competent to handle, without associating with a professional who is competent to handle such matter;

(b) Handling a matter without adequate preparation under the circumstances; or

(c) Neglect in a matter entrusted to him or her.

§ 19.196 Disreputable conduct.

Disreputable conduct for which an individual may be censured, debarred, or suspended from practice before the OCC includes:

(a) Willfully or recklessly violating or willfully or recklessly aiding and abetting the violation of any provision of the Federal banking or applicable securities laws or the rules and regulations thereunder or conviction of any offense involving dishonesty or breach of trust;

(b) Knowingly or recklessly giving false or misleading information, or participating in any way in the giving of false information to the OCC or any officer or employee thereof, or to any tribunal authorized to pass upon matters administered by the OCC in connection

with any matter pending or likely to be pending before it. The term ''information'' includes facts or other statements contained in testimony, financial statements, applications for enrollment, affidavits, declarations, or any other document or written or oral statement;

(c) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the OCC by the use of threats, false accusations, duress, or coercion; by the offer of any special inducement or promise of advantage; or by the bestowing of any gift, favor, or thing of value;

(d) Disbarment or suspension from practice as an attorney, or debarment or suspension from practice as a certified public accountant or public accountant, by any duly constituted authority of any state, possession, or commonwealth of the United States or the District of Columbia for the conviction of a felony or misdemeanor involving moral turpitude, where the conviction has not been reversed on appeal;

(e) Knowingly aiding or abetting another individual to practice before the OCC during that individual's period of suspension, debarment, or ineligibility;

(f) Contemptuous conduct in connection with practice before the OCC, and knowingly making false accusations and statements, or circulating or publishing malicious or libelous matter;

(g) Suspension, debarment, or removal from practice before the Board of Governors, the FDIC, the former OTS, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or any other Federal or state agency; and

(h) Willfully violating any of the regulations contained in this part.

§ 19.197 Initiation of disciplinary proceeding.

(a) *Receipt of information.* An individual, including any employee of the OCC, who has reason to believe that an individual practicing before the OCC in a representative capacity has engaged in any conduct that would serve as a basis for censure, suspension, or debarment under this subpart, may make a report thereof and forward it to the OCC or to such person as may be delegated responsibility for such matters by the Comptroller.

(b) *Censure without formal proceeding.* Upon receipt of information regarding an individual's qualification to practice before the OCC, the Comptroller may, after giving the individual notice and opportunity to respond, censure such individual.

(c) *Institution of formal disciplinary proceeding.* When the Comptroller has reason to believe that any individual who practices before the OCC in a representative capacity has engaged in conduct that would serve as a basis for censure, suspension, or debarment under § 19.192, the Comptroller may, after giving the individual notice and opportunity to respond, institute a formal disciplinary proceeding against such individual. The proceeding will be conducted pursuant to § 19.199 and initiated by a complaint that names the individual as a respondent and is signed by the Comptroller. Except in cases of willfulness, or when time, the nature of the proceeding, or the public interest do not permit, a proceeding under this section may not be commenced until the respondent has been informed, in writing, of the facts or conduct that warrant institution of a proceeding and the respondent has been accorded the opportunity to comply with all lawful requirements or take whatever action may be necessary to remedy the conduct that is the basis for the commencement of the proceeding.

§ 19.198 Conferences.

(a) *General.* The Comptroller may confer with a proposed respondent concerning allegations of misconduct or other grounds for censure, debarment, or suspension, regardless of whether a proceeding for censure, debarment, or suspension has been commenced. If a conference results in a stipulation in connection with a proceeding in which the individual is the respondent, the stipulation may be entered in the record at the request of either party to the proceeding.

(b) *Voluntary suspension or debarment.* In order to avoid the institution of, or a decision in, a debarment or suspension proceeding, a person who practices before the OCC may consent to suspension or debarment from practice. At the discretion of the Comptroller, the individual may be suspended or debarred in accordance with the consent offered.

§ 19.199 Proceedings under this subpart.

Any hearing held under this subpart is held before an ALJ pursuant to procedures set forth in subpart A of this part. The Comptroller will appoint a person to represent the OCC in the hearing. Any person having prior involvement in the matter that is the basis for the suspension or debarment proceeding is disqualified from representing the OCC in the hearing. The hearing will be closed to the public unless the Comptroller, on the Comptroller's initiative or on the request of a party, otherwise directs. The ALJ will issue a recommended decision to the Comptroller, who will issue the final decision and order. The Comptroller may censure, debar, or suspend an individual, or take such other disciplinary action as the Comptroller deems appropriate.

§ 19.200 Effect of debarment, suspension, or censure.

(a) *Debarment.* If the final order against the respondent is for debarment, the individual may not practice before the OCC unless otherwise permitted to do so by the Comptroller pursuant to § 19.201.

(b) *Suspension.* If the final order against the respondent is for suspension, the individual may not practice before the OCC during the period of suspension.

(c) *Censure.* If the final order against the respondent is for censure, the individual may be permitted to practice before the OCC, but such individual's future representations may be subject to conditions designed to promote high standards of conduct. If a written letter of censure is issued, a copy will be maintained in the OCC's files.

(d) *Notice of debarment or suspension.* Upon the issuance of a final order for suspension or debarment, the Comptroller will give notice of the order to appropriate officers and employees of the OCC and to interested departments and agencies of the Federal government. The Comptroller will also give notice to the appropriate authorities of the state in which any debarred or suspended individual is or was licensed to practice.

§ 19.201 Petition for reinstatement.

At the expiration of the period of time designated in the order of debarment, the Comptroller may entertain a petition for reinstatement from any person debarred from practice before the OCC. The Comptroller may grant reinstatement only if satisfied that the petitioner is likely to act in accordance with the regulations in this part, and that granting reinstatement would not be contrary to the public interest. Any request for reinstatement is limited to written submissions unless the Comptroller, at the Comptroller's discretion, affords the petitioner a hearing.

Subpart L—Equal Access to Justice Act

§ 19.205 Authority and scope; waiver.

(a) *In general.* This subpart implements section 203 of the Equal Access to Justice Act (EAJA) (5 U.S.C. 504). EAJA provides for the award of

attorney fees and other expenses to eligible individuals and entities that are parties in certain administrative proceedings (adversary adjudications) before agencies of the Government of the United States. An eligible party may receive an award when it prevails over an agency unless the agency's position was substantially justified or special circumstances make an award unjust. However, no presumption under this subpart arises that the agency's position was not substantially justified because the agency did not prevail.

(b) *Scope.* The types of adversary adjudications covered by this subpart are those proceedings listed in §§ 19.1, 19.110, 19.120, 19.190, 19.230, and 19.241.

(c) *Waiver.* After reasonable notice to the parties, the presiding officer or the OCC may waive, for good cause shown, any provision contained in this subpart as long as the waiver is consistent with the terms and purpose of EAJA.

§ 19.206 Definitions.

For purposes of this subpart:

(a) *Adversary adjudication* means an adjudication under 5 U.S.C. 554 in which the position of the OCC is represented by Enforcement Counsel.

(b) *Final disposition* means the date on which a decision or order disposing of the merits of a proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable both within the OCC and to the courts.

(c) *Party* means a party, as defined in 5 U.S.C. 551(3), that is:

(1) An individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated; or

(2) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (the Code) exempt from taxation under section 501(a) of the Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of the organization or cooperative association. The net worth and number of employees of the applicant and any of its affiliates must be aggregated when determining the applicability of this paragraph (c).

(d) *Position of the OCC* means, in addition to the position taken by the OCC in the adversary adjudication, the action or failure to act by the OCC upon which the adversary adjudication is based, except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(e) *Presiding officer* means the official, whether the official is designated as an ALJ or otherwise, that presided over the adversary adjudication or the official that presides over an EAJA proceeding.

§ 19.207 Application requirements.

(a) *Timing of application.* A party seeking an award under this subpart must file an application with the OCC within 30 days after the OCC's final disposition of the adversary adjudication.

(b) *Contents of application.* An application for an award of fees and expenses under this section must:

(1) Identify the applicant and the proceeding for which an award is sought;

(2) Show that the applicant has prevailed and identify the position of the OCC that the applicant alleges was not substantially justified;

(3) State the basis for the applicant's belief that the OCC position was not substantially justified;

(4) Unless the applicant is an individual, state the number of employees of the applicant and describe briefly the type and purpose of its organization or business;

(5) Show that the applicant meets the definition of ''party'' in § 19.206(c), including documentation of its net worth pursuant to § 19.208, if applicable;

(6) State the amount of fees and expenses for which an award is sought, as documented pursuant to § 19.209;

(7) Be signed by the applicant if the applicant is an individual or by an authorized officer or attorney of the applicant;

(8) Any other matter the applicant wishes the OCC to consider in determining whether and in what amount an award should be made; and

(9) Contain or be accompanied by a written verification under penalty of perjury that the information provided in the application is true and correct.

(c) *Referral of application.* Upon receipt of an EAJA application, the OCC will, if feasible, refer the matter to the official who heard the underlying adversary adjudication.

§ 19.208 Net worth exhibit.

(a) *Required information.* Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and, where appropriate, any of its affiliates at the time the adversary adjudication was initiated. Except as otherwise provided in this section, this exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. A presiding officer may require an applicant to file additional information to determine its eligibility for an award.

(1) An unaudited financial statement is acceptable for individual applicants as long as the statement provides a reliable basis for evaluation, unless the presiding officer or the OCC otherwise requires. Financial statements or reports filed with or reported to a Federal or State agency before the initiation of the adversary adjudication for other purposes and accurate as of a date not more than three months prior to the initiation of the proceeding are acceptable in establishing net worth as of the time of the initiation of the proceeding, unless the presiding officer or the OCC otherwise requires.

(2) In the case of applicants or affiliates that are not banks or savings associations, net worth will be considered for the purposes of this subpart to be the excess of total assets over total liabilities as of the date the underlying proceeding was initiated.

(3) If the applicant or any of its affiliates is a bank or a savings association, the portion of the statement of net worth that relates to the bank or the savings association must consist of a copy of the bank's or savings association's last Consolidated Report of Condition and Income filed before the initiation of the adversary adjudication. Net worth will be considered for the purposes of this subpart to be the total equity capital as reported, in conformity with applicable instructions and guidelines, on the bank's or the savings association's Consolidated Report of Condition and Income filed for the last reporting date before the initiation of the proceeding.

(b) *Confidentiality of net worth submissions.* Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from

disclosure may request that the documents be filed under seal or otherwise be treated as confidential.

§ 19.209 Documentation of fees and expenses.

The application must be accompanied by adequate documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, analysis, report, test, or project. An application seeking an increase in fees to account for inflation pursuant to § 19.215(d)(1)(i) also must include adequate documentation of the change in the consumer price index for the attorney or agent's locality. The applicant must submit a separate itemized statement for each professional firm or individual whose services are covered by the application showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The presiding officer may require the applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed.

§ 19.210 Filing and service of documents.

Any application for an award, or any accompanying documentation related to an application, must be filed and served on all parties to the proceeding in accordance with § 19.11, except as provided in § 19.208(b) for confidential financial information.

§ 19.211 Answer to application.

(a) *Filing of answer.* Except as provided in § 19.213, Enforcement Counsel may file an answer to an application within 30 days after service of the application. Unless Enforcement Counsel requests an extension of time for filing or files a statement of intent to negotiate a settlement under § 19.213, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) *Content of answer.* The answer must explain in detail any objections to the award requested and identify the facts relied on in support of the Enforcement Counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, Enforcement Counsel must include with the answer either supporting affidavits or a request for further proceedings under § 19.214.

§ 19.212 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant must include with the reply either supporting affidavits or a request for further proceedings under § 19.214.

§ 19.213 Settlement.

The applicant and Enforcement Counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded, in accordance with § 19.15. If a prevailing party and Enforcement Counsel agree on a proposed settlement of an award before an application has been filed, the application must be filed with the proposed settlement. If a proposed settlement of an underlying proceeding provides that each side must bear its own expenses and the settlement is accepted, no application may be filed. If, after an application is filed, Enforcement Counsel and the applicant believe that the issues in the application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement will extend, under § 19.211, the time for filing an answer for an additional 30 days, and further extensions may be granted by the presiding officer upon request by Enforcement Counsel and the applicant.

§ 19.214 Further proceedings.

(a) *Process for requesting further proceedings or additional information.* At the request of either the applicant or Enforcement Counsel, or on the presiding officer's own initiative, the presiding officer may, if necessary for a full and fair decision on the application, order the filing of additional written submissions; hold an informal conference or oral argument; or allow for discovery or hold an evidentiary hearing with respect to issues other than whether the OCC's position was substantially justified (such as those involving the applicant's eligibility or substantiation of fees or expenses). Any written submissions must be made, oral argument held, discovery conducted, and evidentiary hearing held as promptly as possible so as not to delay a decision on the application for fees.

(b) *Requirement to identify additional information sought and reason for requesting additional proceedings.* A request for further proceedings under this section must specifically identify the information sought or the disputed issues and must explain why the additional proceedings are necessary to resolve the issues.

§ 19.215 Decision.

(a) *Basis for decision.* The presiding officer must determine whether the position of the OCC was substantially justified on the basis of the administrative record as a whole of the adversary adjudication for which fees and other expenses are sought.

(b) *Timing of decision.* The presiding officer in a proceeding under this subpart will issue a recommended decision, in writing, on the application within 90 days after the time for filing a reply or, when further proceedings are held, within 90 days after completion of proceedings.

(c) *Contents of decision.* The decision on the application must include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and, if applicable, an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision also must include, if applicable, findings on whether Enforcement Counsel's or the OCC's position was substantially justified, whether the applicant unduly and unreasonably protracted the adversary adjudication, or whether special circumstances make an award unjust.

(d) *Awards.*—(1) *In general.* Awards under this subpart may include the reasonable expenses of expert witnesses; the reasonable cost of any study, analysis, report, test, or project; and reasonable attorney or agent fees. The applicant must have incurred these expenses, costs, and fees after initiation of the adversary adjudication subject to the EAJA application. The presiding officer will base awards on prevailing market rates for the kind and quality of the services furnished, even if the services were provided without charge or at reduced rate to the applicant, except that:

(i) No award for the fee of an attorney or agent under this subpart may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A) except to account for inflation since the last update of the statute's maximum award upon the request of the applicant as documented in the application pursuant to § 19.209 or if a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee; and

(ii) No award to compensate an expert witness may exceed the highest rate at which the OCC pays expert witnesses.

(2) *Award for fees of an attorney, agent, or expert witness.* In determining

the reasonableness of the fee sought for an attorney, agent, or expert witness the presiding officer should consider:

(i) If in private practice, the attorney's, agent's, or witness' customary fee for similar services;

(ii) If an employee of the applicant, the fully allocated cost of the attorney's, agent's, or witness' services;

(iii) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services;

(iv) The time actually spent in the representation of the applicant;

(v) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(vi) Any other factors that may bear on the value of the services provided.

(3) *Awards for costs of a study, analysis, report, test, project, or similar matter.* The presiding officer may award the reasonable cost of any study, analysis, report, test, project, or similar matter prepared on behalf of the applicant to the extent that the charge for the service does not exceed the prevailing rate for similar services and the presiding officer finds that the study or other matter was necessary for preparation of the applicant's case.

(4) *Reduction or denial of an award.* A presiding officer may reduce the amount to be awarded, or deny any award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy or if special circumstances make the award sought unjust.

(e) *Final agency decision.* The Comptroller will issue a final decision on the application or remand the application to the presiding officer for further proceedings in accordance with § 19.40.

§ 19.216 Agency review.

Either the applicant or Enforcement Counsel may seek review of the presiding officer's decision on the fee application, in accordance with § 19.39.

§ 19.217 Judicial review.

An applicant may seek judicial review of final agency decisions on awards made under this section as provided in 5 U.S.C. 504(c)(2).

§ 19.218 Stay of decision concerning award.

Any proceedings on an application for fees under this subpart will be automatically stayed until the OCC's final disposition of the decision on which the application is based and either the time period for seeking judicial review expires, or if review has been sought, until final disposition is made by a court and no further judicial review is available.

§ 19.219 Payment of award.

(a) *Requirement to submit final decision.* An applicant seeking payment of an award must submit to the OCC's Litigation Group a copy of the OCC's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. Applicants should send the submissions to: Office of the Comptroller of the Currency, Washington, DC 20219, Attention: Director, Litigation Group.

(b) *Time frame for award payment.* The OCC will pay the amount awarded to the applicant within 90 days.

Subpart M—Procedures for Reclassifying an Insured Depository Institution Based on Criteria Other Than Capital Under Prompt Corrective Action

§ 19.220 Scope.

This subpart applies to the procedures afforded to any insured depository institution that has been reclassified to a lower capital category by a notice or order issued by the OCC pursuant to section 38 of the FDIA (12 U.S.C. 1831o) and 12 CFR part 6 (prompt corrective action). For purposes of this subpart, *insured depository institution* means an insured national bank, an insured Federal savings association, an insured Federal savings bank, or an insured Federal branch of a foreign bank.

§ 19.221 Reclassification of an insured depository institution based on unsafe or unsound condition or practice.

(a) *Issuance of notice of proposed reclassification*—(1) *Grounds for reclassification.* (i) Pursuant to § 6.4 of this chapter, the OCC may reclassify a well capitalized insured depository institution as adequately capitalized or subject an adequately capitalized or undercapitalized insured depository institution to the supervisory actions applicable to the next lower capital category if:

(A) The OCC determines that the insured depository institution is in an unsafe or unsound condition; or

(B) The OCC deems the insured depository institution to be engaging in an unsafe or unsound practice and not to have corrected the deficiency.

(ii) Any action pursuant to this paragraph (a)(1) is referred to in this subpart as ''reclassification.''

(2) *Prior notice to institution.* Prior to taking action pursuant to § 6.4 of this chapter, the OCC will issue and serve on the insured depository institution a written notice of the OCC's intention to reclassify the insured depository institution.

(b) *Contents of notice.* A notice of intention to reclassify an insured depository institution based on unsafe or unsound condition will include:

(1) A statement of the insured depository institution's capital measures and capital levels and the category to which the insured depository institution would be reclassified;

(2) The reasons for reclassification of the insured depository institution; and

(3) The date by which the insured depository institution subject to the notice of reclassification may file with the OCC a written response to the proposed reclassification and a request for a hearing, which must be at least 14 calendar days from the date of service of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the insured depository institution or other relevant circumstances.

(c) *Response to notice of proposed reclassification.* An insured depository institution may file a written response to a notice of proposed reclassification within the time period set by the OCC. The response should include:

(1) An explanation of why the insured depository institution is not in unsafe or unsound condition or otherwise should not be reclassified; and

(2) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the insured depository institution or company regarding the reclassification.

(d) *Failure to file response.* Failure by an insured depository institution to file, within the specified time period, a written response with the OCC to a notice of proposed reclassification will constitute a waiver of the opportunity to respond and will constitute consent to the reclassification.

(e) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the OCC under this section. If the insured depository institution desires to present oral testimony or witnesses at the hearing, the insured depository institution must include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses must specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing will constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or

witnesses will constitute a waiver of any right to present oral testimony or witnesses.

(f) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the OCC will issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the insured depository institution. The hearing will be held in Washington, DC or at such other place as may be designated by the OCC before a presiding officer(s) designated by the OCC to conduct the hearing.

(g) *Hearing procedures.* (1) The insured depository institution has the right to introduce relevant written materials and to present oral argument at the hearing. The insured depository institution may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules apply to an informal hearing under this section unless the OCC orders that such procedures will apply.

(2) The informal hearing will be recorded and a transcript furnished to the insured depository institution upon request and payment of the cost thereof. Witnesses need not be sworn unless specifically requested by a party or the presiding officer(s). If so requested, and by stipulation of the parties or by order of the presiding officer, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the witness. The presiding officer(s) may ask questions of any witness.

(3) Based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for its own presentation and related costs unless the parties agree to another manner by which to allocate presentation responsibilities and costs.

(4) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(h) *Recommendation of presiding officer(s).* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) will make a recommendation to the OCC on the reclassification.

(i) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will decide whether to reclassify the insured depository institution and notify the insured depository institution of the OCC's decision.

§ 19.222 Request for rescission of reclassification.

Any insured depository institution that has been reclassified under part 6 of this chapter and this subpart, may, upon a change in circumstances, request in writing that the OCC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OCC, the insured depository institution will remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OCC.

Subpart N—Order To Dismiss a Director or Senior Executive Officer Under Prompt Corrective Action

§ 19.230 Scope.

This subpart applies to informal hearings afforded to any director or senior executive officer dismissed pursuant to an order issued under section 38 of the FDIA (12 U.S.C. 1831o) and 12 CFR part 6 (prompt corrective action). For purposes of this subpart, *insured depository institution* means an insured national bank, an insured Federal savings association, an insured Federal savings bank, or an insured Federal branch of a foreign bank.

§ 19.231 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the OCC issues and serves a directive on an insured depository institution pursuant to subpart B of 12 CFR part 6 requiring the insured depository institution to dismiss from office any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDIA, the OCC will also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The Respondent must file this request for reinstatement within 10 calendar days of the receipt of the OCC directive, unless further time is allowed by the OCC at the request of the Respondent. Failure by the Respondent to file a written request for reinstatement with the OCC within the specified time period will constitute a waiver of the opportunity to respond and will constitute consent to the dismissal.

(2) *Contents of request; informal hearing.* The request for reinstatement must include reasons why the Respondent should be reinstated and may include a request for an informal hearing before the OCC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent must include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses must specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing will constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses will constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the OCC, the dismissal will remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring an insured depository institution to dismiss from office any director or senior executive officer, the OCC will issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the Respondent. The hearing will be held in Washington, DC, or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(d) *Hearing procedures*—(1) *Role of respondent.* A Respondent may appear at the hearing personally or through counsel. A Respondent has the right to introduce relevant written materials and to present oral argument at the hearing.

(2) *Application of Administrative Procedure Act and Uniform Rules.* Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules apply to an informal hearing under this

section unless the OCC orders that such procedures will apply.

(3) *Electronic presentation.* Based on the circumstances of each hearing, the presiding officer may direct the use of, or any party may elect to use, an electronic presentation during the hearing. If the presiding officer requires an electronic presentation during the hearing, each party will be responsible for its own presentation and related costs unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

(4) *Recordings; transcript.* The informal hearing will be recorded and a transcript furnished to the Respondent upon request and payment of the cost thereof.

(5) *Witnesses.* A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). If so requested, and by stipulation of the parties or by order of the presiding officer, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the witness. The presiding officer(s) may ask questions of any witness.

(6) *Continuance.* The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent bears the burden of demonstrating that their continued employment by or service with the insured depository institution would materially strengthen the insured depository institution's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the insured depository institution's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the insured depository institution based on supervisory criteria other than capital, pursuant to section 38(g) of the FDIA.

(f) *Recommendation of presiding officer.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) will make a recommendation to the OCC concerning the Respondent's request for reinstatement with the insured depository institution.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will grant or deny the request for reinstatement and notify the Respondent of the OCC's decision. If the OCC denies the request for reinstatement, the OCC will set forth in the notification the reasons for the OCC's action.

Subpart O—Civil Money Penalty Inflation Adjustments

§ 19.240 Inflation adjustments.

(a) *Statutory formula to calculate inflation adjustments.* The OCC is required by statute to annually adjust for inflation the maximum amount of each civil money penalty within its jurisdiction to administer. The OCC calculates the inflation adjustment by multiplying the maximum dollar amount of the civil money penalty for the previous calendar year by the cost-of-living inflation adjustment multiplier provided annually by the Office of Management and Budget and rounding the total to the nearest dollar.

(b) *Notice of inflation adjustments.* The OCC will publish notice in the **Federal Register** of the maximum penalties which may be assessed on an annual basis on or before January 15 of each calendar year based on the formula in paragraph (a) of this section, for penalties assessed on, or after, the date of publication of the most recent notice related to conduct occurring on, or after, November 2, 2015.

Subpart P—Removal, Suspension, and Debarment of Accountants From Performing Audit Services

§ 19.241 Scope.

This subpart, which implements section 36(g)(4) of the FDIA (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services required by section 36 of the FDIA (12 U.S.C. 1831m) for insured national banks, insured Federal savings associations, and insured Federal branches of foreign banks.

§ 19.242 Definitions.

As used in this subpart, the following terms have the meaning given below unless the context requires otherwise:

(a) *Accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

(b) *Audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA (12 U.S.C. 1831m) and 12 CFR part 363, including attestation services.

(c) *Independent public accountant (accountant)* means any individual who performs or participates in providing audit services.

§ 19.243 Removal, suspension, or debarment.

(a) *Good cause for removal, suspension, or debarment*—(1) *Individuals.* The Comptroller may remove, suspend, or debar an independent public accountant from performing audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks that are subject to section 36 of the FDIA (12 U.S.C. 1831m) if, after service of a notice of intention and opportunity for hearing in the matter, the Comptroller finds that the accountant:

(i) Lacks the requisite qualifications to perform audit services;

(ii) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflicts of interest provisions applicable to accountants through the Sarbanes-Oxley Act of 2002, Public Law 107–204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act), and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(iii) Has engaged in negligent conduct in the form of:

(A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or

(B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(iv) Has knowingly or recklessly given false or misleading information, or knowingly or recklessly participated in any way in the giving of false or misleading information, to the OCC or any officer or employee of the OCC;

(v) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law;

(vi) Has been removed, suspended, or debarred from practice before any Federal or State agency regulating the

banking, insurance, or securities industries, other than by an action listed in § 19.244, on grounds relevant to the provision of audit services; or

(vii) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any State, possession, commonwealth, or the District of Columbia.

(2) *Accounting firms.* If the Comptroller determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (a)(1) of this section, the Comptroller also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar a firm or an office thereof, and the term of any sanction against a firm under this section, the Comptroller may consider, for example:

(i) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for the removal, suspension, or debarment;

(ii) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(iii) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(iv) The extent to which managing partners or senior officers of the accounting firm have participated, directly, or indirectly through oversight or review, in the act or failure to act; and

(v) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(3) *Limited scope orders.* An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the Comptroller, be made applicable to a particular insured national bank, insured Federal savings association, or insured Federal branch of a foreign bank or class of insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks.

(4) *Remedies not exclusive.* The remedies provided in this subpart are in addition to any other remedies the OCC may have under any other applicable provisions of law, rule, or regulation.

(b) *Proceedings to remove, suspend, or debar*—(1) *Initiation of formal removal, suspension, or debarment proceedings.* The Comptroller may initiate a proceeding to remove, suspend, or debar an accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) *Hearings under paragraph (b) of this section.* An accountant or firm named as a respondent in the notice issued under paragraph (b)(1) of this section may request a hearing on the allegations in the notice. Hearings conducted under this paragraph (b)(2) will be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure in subpart A of this part, subject to the limitations in paragraph (c)(4) of this section.

(c) *Immediate suspension from performing audit services*—(1) *In general.* If the Comptroller serves a written notice of intention to remove, suspend, or debar an accountant or accounting firm from performing audit services, the Comptroller may, with due regard for the public interest and without a preliminary hearing, immediately suspend such accountant or firm from performing audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks, if the Comptroller:

(i) Has a reasonable basis to believe that the accountant or firm has engaged in conduct (specified in the notice served on the accountant or firm under paragraph (b) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (a) of this section;

(ii) Determines that immediate suspension is necessary to avoid immediate harm to an insured depository institution or its depositors or to the depository system as a whole; and

(iii) Serves such respondent with written notice of the immediate suspension.

(2) *Procedures.* An immediate suspension notice issued under this paragraph (c)(2) will become effective upon service. Such suspension will remain in effect until the date the Comptroller dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Comptroller to the respondent.

(3) *Petition for stay.* Any accountant or firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file with the Office of the Comptroller of the Currency, Washington, DC 20219 for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the right to a petition is waived and the immediate suspension remains in effect pursuant to paragraph (c)(2) of this section.

(4) *Hearing on petition.* Upon receipt of a stay petition, the Comptroller will designate a presiding officer who will fix a place and time (not more than 10 calendar days after receipt of the petition, unless further time is allowed by the presiding officer at the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. Any OCC employee engaged in investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the OCC, except as witness or counsel in the proceeding. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses may also be presented. In hearings held pursuant to this paragraph (c)(4) there will be no discovery and the provisions of §§ 19.6 through 19.12, 19.16, and 19.21 apply.

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer will issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the presiding officer within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the presiding officer will promptly certify the entire record to the Comptroller. Within 60 calendar days of the presiding officer's certification, the Comptroller will issue an order notifying the affected party whether or not the immediate suspension should be

continued or reinstated. The order will state the basis of the Comptroller's decision.

§ 19.244 Automatic removal, suspension, or debarment.

(a) An independent public accountant or accounting firm may not perform audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks if the accountant or firm:

(1) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the former Office of Thrift Supervision under section 36 of the FDIA (12 U.S.C. 1831m);

(2) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or

(3) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission.

(b) Upon written request, the Comptroller, for good cause shown, may grant written permission to such accountant or firm to perform audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks. The request must contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

§ 19.245 Notice of removal, suspension, or debarment.

(a) *Notice to the public.* Upon the issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the Comptroller will make the order publicly available and provide notice of the order to the other Federal banking agencies.

(b) *Notice to the Comptroller by accountants and firms.* An accountant or accounting firm that provides audit services to an insured national bank, insured Federal savings association, or insured Federal branch of a foreign bank must provide the Comptroller with written notice of:

(1) Any currently effective order or other action described in § 19.243(a)(1)(vi) through (vii) or § 19.244(a)(2) and (3); and

(2) Any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) *Timing of notice.* Written notice required by this paragraph (c) must be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or firm accepts an engagement to provide audit services, whichever date is earlier.

§ 19.246 Petition for reinstatement.

(a) *Form of petition.* Unless otherwise ordered by the Comptroller, a petition for reinstatement by an independent public accountant, an accounting firm, or an office of a firm that was removed, suspended, or debarred under § 19.243 may be made in writing at any time. The request must contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

(b) *Procedure.* A petitioner for reinstatement under this section may, in the sole discretion of the Comptroller, be afforded a hearing. The accountant or firm bears the burden of going forward with a petition and proving the grounds asserted in support of the petition. In reinstatement proceedings, the person seeking reinstatement bears the burden of going forward with an application and proving the grounds asserted in support of the application. The Comptroller may, in his sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment will continue until the Comptroller, for good cause shown, has reinstated the petitioner or until the suspension period has expired. The filing of a petition for reinstatement will not stay the effectiveness of the removal, suspension, or debarment of an accountant or firm.

Subpart Q—Forfeiture of Franchise for Money Laundering or Cash Transaction Reporting Offenses

§ 19.250 Scope.

Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to 12 U.S.C. 93(d) or 12 U.S.C. 1464(w), as applicable, to terminate all rights, privileges, and franchises of a national bank, Federal savings association, or Federal branch or agency convicted of a criminal offense under 18 U.S.C. 1956 or 1957 or 31 U.S.C. 5322 or 5324.

§ 19.251 Notice and hearing.

(a) *In general.* After receiving written notification from the Attorney General of the United States of a conviction of a criminal offense under 18 U.S.C. 1956 or 1957, the Comptroller will, or under 31 U.S.C. 5322 or 5324, the Comptroller may:

(1) Issue to the national bank, Federal savings association, or Federal branch or agency a written notice of the Comptroller's intention to terminate all rights, privileges, and franchises of the national bank, Federal savings association, or Federal branch or agency pursuant to 12 U.S.C. 93(d) or 12 U.S.C. 1464(w); and

(2) Schedule a pretermination hearing.

(b) *Contents of notice.* The notice issued pursuant to paragraph (a)(1) of this section must set forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) The basis of termination pursuant to the factors listed in § 19.253;

(3) A proposed order or prayer for an order of termination;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as established by the presiding officer; and

(6) That the answer must be filed with the OCC.

(c) *Failure to file an answer.* Unless the national bank, Federal savings association, or Federal branch or agency files an answer within the time specified in the notice, it will be deemed to have consented to termination of its rights, privileges and franchises and the Comptroller may order the termination of such rights, privileges, and franchises.

(d) *Service.* The OCC will serve the notice upon the national bank, Federal savings association, or Federal branch or agency in the manner set forth in § 19.11(c).

§ 19.252 Presiding officer.

(a) *Appointment.* The Comptroller will designate a presiding officer to conduct the pretermination hearing under this subpart.

(b) *Powers.* The presiding officer has the same powers set forth in § 19.5, including the discretion necessary to conduct the pretermination hearing in a manner that avoids unnecessary delay. In addition, the presiding officer may limit the use of discovery and limit opportunities to file written memoranda, briefs, affidavits, or other

materials or documents to avoid relitigation of facts already stipulated to by the parties; conceded to by the national bank, Federal savings association, or Federal branch or Federal agency; or otherwise already firmly established by the underlying criminal conviction.

§ 19.253 Grounds for termination.

In determining whether to terminate a franchise, the Comptroller will take into account the following factors:

(a) The extent to which directors or senior executive officers of the national bank, Federal savings association, or Federal branch or agency knew of, or were involved in, the commission of the money laundering offense of which the national bank, Federal savings association, or Federal branch or agency was found guilty;

(b) The extent to which the offense occurred despite the existence of policies and procedures within the national bank, Federal savings association, or Federal branch or Federal agency which were designed to prevent the occurrence of the offense;

(c) The extent to which the national bank, Federal savings association, or Federal branch or agency has fully cooperated with law enforcement authorities with respect to the investigation of the money laundering offense of which the national bank, Federal savings association, or Federal branch or agency was found guilty;

(d) The extent to which the national bank, Federal savings association, or Federal branch or agency has implemented additional internal controls (since the commission of the offense of which the national bank, Federal savings association, or Federal branch or agency was found guilty) to prevent the occurrence of any money laundering offense; and

(e) The extent to which the interest of the local community in having adequate deposit and credit services available would be threatened by the forfeiture of the franchise.

§ 19.254 Judicial review.

Any national bank, Federal savings association, or Federal branch or agency of a foreign bank whose rights, privileges and franchises have been terminated by order of the Comptroller under this part has the right of judicial review of such order pursuant to 12 U.S.C. 1818(h).

Appendix A to Part 19—Rules of Practice and Procedure

Note: The content of this appendix reproduces 12 CFR parts 19, 108, 109, 112, and 165 as of October 1, 2023, which, pursuant to § 19.0, are applicable to adjudicatory actions initiated before April 1, 2024, unless the parties otherwise stipulate that the rules in this part in effect after April 1, 2024 apply. Cross-references to parts 19, 108, 109, and 112 (as well as to included sections) in this appendix are to those provisions as contained within this appendix.

PART 19—RULES OF PRACTICE AND PROCEDURE

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 93a, 164, 481, 504, 1817, 1818, 1820, 1831m, 1831o, 1832, 1884, 1972, 3102, 3108(a), 3110, 3909, and 4717; 15 U.S.C. 78(h) and (i), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, and 1639e; 28 U.S.C. 2461 note; 31 U.S.C. 330 and 5321; and 42 U.S.C. 4012a.

Subpart A—Uniform Rules of Practice and Procedure

§ 19.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (''FDIA'') (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Office of the Comptroller of the Currency (''OCC'') should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the OCC is the appropriate agency;

(e) Assessment of civil money penalties by the OCC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Any provision of law referenced in 12 U.S.C. 93, or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 93;

(2) Sections 22 and 23 of the Federal Reserve Act (''FRA''), or any regulation issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 106(b) of the Bank Holding Company Amendments of 1970, pursuant to 12 U.S.C. 1972(2)(F);

(4) Any provision of the Change in Bank Control Act of 1978 or any regulation or order issued thereunder, and certain unsafe or unsound practices and breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Any provision of the International Lending Supervision Act of 1983 (''ILSA''), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 (''IBA''), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(7) Section 5211 of the Revised Statutes (12 U.S.C. 161), pursuant to 12 U.S.C. 164;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA'') (12 U.S.C. 3349), or any order or regulation issued thereunder;

(10) The terms of any final or temporary order issued under section 8 of the FDIA or any written agreement executed by the OCC, the terms of any condition imposed in writing by the OCC in connection with the grant of an application or request, certain unsafe or unsound practices, breaches of fiduciary duty, or any law or regulation not otherwise provided herein, pursuant to 12 U.S.C. 1818(i)(2);

(11) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder; and

(12) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDI Act (12 U.S.C. 1820(k)) for violations of the post-employment restrictions imposed by that section; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 19.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 19.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Comptroller* means the Comptroller of the Currency or a person delegated to perform the functions of the Comptroller of the Currency under this part.

(d) *Decisional employee* means any member of the Comptroller's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Comptroller or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the OCC in an adjudicatory proceeding.

(f) *Final order* means an order issued by the Comptroller with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes any national bank or Federal branch or agency of a foreign bank.

(h) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(i) *Local Rules* means those rules promulgated by the OCC in the subparts of this part excluding subpart A.

(j) *OCC* means the Office of the Comptroller of the Currency.

(k) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the OCC, the Board of Governors of the Federal Reserve System (''Board of Governors''), the Federal Deposit Insurance Corporation (''FDIC''), the Office of Thrift Supervision (''OTS''), and the National Credit Union Administration (''NCUA'').

(l) *Party* means the OCC and any person named as a party in any notice.

(m) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (g) of this section.

(n) *Respondent* means any party other than the OCC.

(o) *Uniform Rules* means those rules in subpart A of this part that are common to the OCC, the Board of Governors, the FDIC, the OTS, and the NCUA.

(p) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 19.4 Authority of the Comptroller.

The Comptroller may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 19.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 19.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Comptroller shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Comptroller a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 19.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the OCC or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the OCC if such attorney is not currently suspended or debarred from practice before the OCC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the OCC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Comptroller, shall file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law

judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 19.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 19.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 19.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 19.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the OCC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Comptroller, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Comptroller until the date that the Comptroller issues his or her final decision pursuant to § 19.40(c):

(1) No interested person outside the OCC shall make or knowingly cause to be made an ex parte communication to the Comptroller, the administrative law judge, or a decisional employee; and

(2) The Comptroller, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the OCC any ex parte communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, the Comptroller or any other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Comptroller or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions.* Except to the extent required for the disposition of ex parte matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 19.40, except as witness or counsel in public proceedings.

§ 19.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 19.25 and 19.26, shall be filed with OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Comptroller or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Comptroller or the administrative law

judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8½ × 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 19.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the OCC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Comptroller or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 19.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 19.10(c).

(c) *By the Comptroller or the administrative law judge.* (1) All papers required to be served by the Comptroller or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 19.6 shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 19.6, the Comptroller or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which, in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 19.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Comptroller or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Comptroller or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 19.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Comptroller pursuant to § 19.38, the Comptroller may grant extensions of the time limits for good

cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Comptroller's or the administrative law judge's own motion.

§ 19.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the OCC is the party requesting the subpoena. The OCC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the OCC.

§ 19.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any OCC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 19.16 OCC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the OCC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the OCC to conduct or continue any form of investigation authorized by law.

§ 19.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 19.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a proceeding governed by this subpart is commenced by issuance of a notice by the Comptroller.

(ii) The notice must be served by the Comptroller upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Comptroller.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the OCC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing shall be filed with OFIA.

§ 19.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Comptroller based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 19.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Comptroller or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 19.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice.

§ 19.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 19.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Comptroller.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Comptroller, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 19.29 and 19.30.

§ 19.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term ''documents'' may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by subpart I of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 19.25.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 19.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed by 12 CFR part 4 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 19.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 19.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 19.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 19.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 19.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 19.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 19.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance of the witness at a deposition. The administrative law

judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 19.28 Interlocutory review.

(a) *General rule.* The Comptroller may review a ruling of the administrative law judge prior to the certification of the record to the Comptroller only in accordance with the procedures set forth in this section and § 19.23.

(b) *Scope of review.* The Comptroller may exercise interlocutory review of a ruling of the administrative law judge if the Comptroller finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 19.23. Any party may file a response to a request for interlocutory review in accordance with § 19.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Comptroller for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Comptroller under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Comptroller.

§ 19.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Comptroller issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party

contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Comptroller. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 19.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 19.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a ''scheduling conference.'' The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 19.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 19.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Comptroller, in the Comptroller's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Comptroller a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Comptroller. The form of, and procedure for, these requests and replies are governed by § 19.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 19.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an

application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 19.26(c).

§ 19.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) Order of hearing. Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the administrative law judge shall fix the order.

(3) Examination of witnesses. Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) Stipulations. Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

§ 19.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or the Comptroller shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Comptroller.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible

had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 19.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 19.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 19.37(b), the administrative law judge shall file with and certify to the Comptroller, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Comptroller for final determination the record of the proceeding, the administrative law judge shall furnish to the Comptroller a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 19.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 19.38, a party may file with the Comptroller written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Comptroller if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 19.40 Review by the Comptroller.

(a) *Notice of submission to the Comptroller.* When the Comptroller determines that the record in the proceeding is complete, the Comptroller shall serve notice upon the parties that the proceeding has been submitted to the Comptroller for final decision.

(b) *Oral argument before the Comptroller.* Upon the initiative of the Comptroller or on the written request of any party filed with the Comptroller within the time for filing exceptions, the Comptroller may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Comptroller's final decision. Oral argument before the Comptroller must be on the record.

(c) *Comptroller's final decision.* (1) Decisional employees may advise and assist the Comptroller in the consideration and disposition of the case. The final decision of the Comptroller will be based upon review of the entire record of the proceeding, except that the Comptroller may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Comptroller shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Comptroller orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Comptroller shall be served upon each party to the proceeding, upon other

persons required by statute, and, if directed by the Comptroller or required by statute, upon any appropriate state or Federal supervisory authority.

§ 19.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Comptroller may not, unless specifically ordered by the Comptroller or a reviewing court, operate as a stay of any order issued by the Comptroller. The Comptroller may, in his or her discretion, and on such terms as he or she finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Subpart B—Procedural Rules for OCC Adjudications

§ 19.100 Filing documents.

All materials required to be filed with or referred to the Comptroller or the administrative law judge in any proceeding under this part must be filed with the Hearing Clerk, Office of the Comptroller of the Currency, Washington, DC 20219. Filings to be made with the Hearing Clerk include the notice and answer; motions and responses to motions; briefs; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition; referrals by the administrative law judge of motions for interlocutory review; exceptions and requests for oral argument; and any other papers required to be filed with the Comptroller or the administrative law judge under this part.

§ 19.101 Delegation to OFIA.

Unless otherwise ordered by the Comptroller, administrative adjudications subject to subpart A of this part shall be conducted by an administrative law judge assigned to OFIA.

Subpart C—Removals, Suspensions, and Prohibitions When a Crime Is Charged or a Conviction Is Obtained

§ 19.110 Scope.

This subpart applies to informal hearings afforded to any institution-affiliated party who has been suspended or removed from office or prohibited from further participation in the affairs of any depository institution pursuant to 12 U.S.C. 1818(g) by a notice or order issued by the Comptroller.

§ 19.111 Suspension, removal, or prohibition.

The Comptroller may serve a notice of suspension or order of removal or prohibition pursuant to 12 U.S.C. 1818(g) on an institution-affiliated party. A copy of such notice or order will be served on any depository institution that the subject of the notice or order is affiliated with at the time the notice or order is issued, whereupon the institution-affiliated party involved must immediately cease service to, or participation in the affairs of, that depository institution and, if so determined by the OCC, any other depository institution. The notice or order will indicate the basis for suspension, removal or prohibition and will inform the institution-affiliated party of the right to request in writing, to be received by the OCC within 30 days from the date that the institution-affiliated party was served with such notice or order, an opportunity to show at an informal hearing that continued service to or participation in the conduct of the affairs of any depository institution has not posed, does not pose, or is not likely to pose a threat to the interests of the depositors of, or has not threatened, does not threaten, or is not likely to threaten to impair public confidence in, any relevant depository institution. The written request must be sent by certified mail to, or served personally with a signed receipt on, the District Deputy Comptroller in the OCC district in which the bank in question is located; if the bank is supervised by Large Bank Supervision, to the Senior Deputy Comptroller for Large Bank Supervision for the Office of the Comptroller of the Currency; if the bank is supervised by Mid-Size/Community Bank Supervision, to the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision for the Office of the Comptroller of the Currency; or if the institution-affiliated party is no longer affiliated with a particular national bank, to the Deputy Comptroller for Special Supervision, Washington, DC 20219. The request must state specifically the relief desired and the grounds on which that relief is based. For purposes of this section, the term *depository institution* means any depository institution of which the petitioner is or was an institution-affiliated party at the time at which the notice or order was issued by the Comptroller.

§ 19.112 Informal hearing.

(a) *Issuance of hearing order.* After receipt of a request for hearing, the District Deputy Comptroller, the Senior Deputy Comptroller for Large Bank Supervision, the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision, or the Deputy Comptroller for Special Supervision, as appropriate, must notify the petitioner requesting the hearing, the OCC's Enforcement and Compliance Division, and the appropriate OCC District Counsel of the date, time, and place fixed for the hearing. The hearing must be scheduled to be held not later than 30 days from the date when a request for hearing is received unless the time is extended in response to a written request of the petitioner. The District Deputy Comptroller, the Senior Deputy Comptroller for Large Bank Supervision, the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision, or the Deputy Comptroller for Special Supervision, as appropriate, may extend the hearing date only for a specific period of time and must take appropriate action to ensure that the hearing is not unduly delayed.

(b) *Appointment of presiding officer.* the District Deputy Comptroller, the Senior Deputy Comptroller for Large Bank Supervision, the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision, or the Deputy Comptroller for Special Supervision, as appropriate, must appoint one or more OCC employees as the presiding officer to conduct the hearing. The presiding officer(s) may not have been involved in the proceeding, a factually related proceeding, or the underlying enforcement action in a prosecutorial or investigative role.

(c) *Waiver of oral hearing*—(1) *Petitioner.* When the petitioner requests a hearing, the petitioner may elect to have the matter determined by the presiding officer solely on the basis of written submissions by serving on the District Deputy Comptroller, the Senior Deputy Comptroller for Large Bank Supervision, the Senior Deputy Comptroller for Mid-Size/Community Bank Supervision, or the Deputy Comptroller for Special Supervision, as appropriate, and all parties, a signed document waiving the statutory right to appear and make oral argument. The petitioner must present the written submissions to the presiding officer, and serve the other parties, not later than ten days prior to the date fixed for the hearing, or within such shorter time period as the presiding officer may permit.

(2) *OCC.* The OCC may respond to the petitioner's submissions by presenting the presiding officer with a written response, and by serving the other parties, not later than the date fixed for the hearing, or within such other time

period as the presiding officer may require.

(d) *Hearing procedures*—(1) *Conduct of hearing.* Hearings under this subpart are not subject to the provisions of subpart A of this part or the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 554–557).

(2) *Powers of the presiding officer.* The presiding officer shall determine all procedural issues that are governed by this subpart. The presiding officer may also permit or limit the number of witnesses and impose time limitations as he or she deems reasonable. The informal hearing will not be governed by the formal rules of evidence. All oral presentations, when permitted, and documents deemed by the presiding officer to be relevant and material to the proceeding and not unduly repetitious will be considered. The presiding officer may ask questions of any person participating in the hearing and may make any rulings reasonably necessary to facilitate the effective and efficient operation of the hearing.

(3) *Presentation.* (i) The OCC may appear and the petitioner may appear personally or through counsel at the hearing to present relevant written materials and oral argument. Except as permitted in paragraph (c) of this section, each party, including the OCC, must file a copy of any affidavit, memorandum, or other written material to be presented at the hearing with the presiding officer and must serve the other parties not later than ten days prior to the hearing or within such shorter time period as permitted by the presiding officer.

(ii) If the petitioner or the appointed OCC attorney desires to present oral testimony or witnesses at the hearing, he or she must file a written request with the presiding officer not later than ten days prior to the hearing, or within a shorter time period as permitted by the presiding officer. The names of proposed witnesses should be included, along with the general nature of the expected testimony, and the reasons why oral testimony is necessary. The presiding officer generally will not admit oral testimony or witnesses unless a specific and compelling need is demonstrated. Witnesses, if admitted, shall be sworn.

(iii) In deciding on any suspension, the presiding officer shall not consider the ultimate question of the guilt or innocence of the individual with respect to the criminal charges which are outstanding. In deciding on any removal, the presiding officer shall not consider challenges to or efforts to impeach the validity of the conviction. The presiding officer may consider facts in either situation, however, which show the nature of the events on which the indictment or conviction was based.

(4) *Record.* A transcript of the proceedings may be taken if the petitioner requests a transcript and agrees to pay all expenses or if the presiding officer determines that the nature of the case warrants a transcript. The presiding officer may order the record to be kept open for a reasonable period following the hearing, not to exceed five business days, to permit the petitioner or the appointed OCC attorney to submit additional documents for the record. Thereafter, no further submissions may be accepted except for good cause shown.

§ 19.113 Recommended and final decisions.

(a) The presiding officer must issue a recommended decision to the Comptroller within 20 days of the conclusion of the hearing or, when the petitioner has waived an oral hearing, within 20 days of the date fixed for the hearing. The presiding officer must serve promptly a copy of the recommended decision on the parties to the proceeding. The decision must include a summary of the facts and arguments of the parties.

(b) Each party may, within ten days of being served with the presiding officer's recommended decision, submit to the Comptroller comments on the recommended decision.

(c) Within 60 days of the conclusion of the hearing or, when the petitioner has waived an oral hearing, within 60 days from the date fixed for the hearing, the Comptroller must notify the petitioner by registered mail whether the suspension or removal from office, and prohibition from participation in any manner in the affairs of any depository institution, will be affirmed, terminated, or modified. The Comptroller's decision must include a statement of reasons supporting the decision. The Comptroller's decision is a final and unappealable order.

(d) A finding of not guilty or other disposition of the charge on which a notice of suspension was based does not preclude the Comptroller from thereafter instituting removal proceedings pursuant to section 8(e) of the FDIA (12 U.S.C. 1818(e)) and subpart: A of this part.

(e) A removal or prohibition by order remains in effect until terminated by the Comptroller. A suspension or prohibition by notice remains in effect until the criminal charge is disposed of or until terminated by the Comptroller.

(f) A suspended or removed individual may petition the Comptroller to reconsider the decision any time after the expiration of a 12-month period from the date of the decision, but no petition for reconsideration may be made within 12 months of a previous petition. The petition must state specifically the relief sought and the grounds therefor, and may be accompanied by a supporting memorandum and any other documentation the petitioner wishes to have considered. No hearing need be granted on the petition for reconsideration.

Subpart D—Exemption Hearings Under Section 12(h) of the Securities Exchange Act of 1934

§ 19.120 Scope.

The rules in this subpart apply to informal hearings that may be held by the Comptroller to determine whether, pursuant to authority in sections 12 (h) and (i) of the Exchange Act (15 U.S.C. 78*l* (h) and (i)), to exempt in whole or in part an issuer or a class of issuers from the provisions of section 12(g), or from section 13 or 14 of the Exchange Act (15 U.S.C. 78*l*(g), 78m or 78n), or whether to exempt from section 16 of the Exchange Act (15 U.S.C. 78p) any officer, director, or beneficial owner of securities of an issuer. The only issuers covered by this subpart are banks whose securities are registered pursuant to section 12(g) of the Exchange Act (15 U.S.C. 78*l*(g)). The Comptroller may deny an application for exemption without a hearing.

§ 19.121 Application for exemption.

An issuer or an individual (officer, director or shareholder) may submit a written application for an exemption order to the Securities and Corporate Practices Division, Office of the Comptroller of the Currency, Washington, DC 20219. The application must specify the type of exemption sought and the reasons therefor, including an explanation of why an exemption would not be inconsistent with the public interest or the protection of investors. The Securities and Corporate Practices Division shall inform the applicant in writing whether a hearing will be held to consider the matter.

§ 19.122 Newspaper notice.

Upon being informed that an application will be considered at a hearing, the applicant shall publish a notice one time in a newspaper of general circulation in the community where the issuer's main office is located. The notice must state: the name and title of any individual applicants; the

type of exemption sought; the fact that a hearing will be held; and a statement that interested persons may submit to the Securities and Corporate Practices Division, Office of the Comptroller of the Currency, Washington, DC 20219, within 30 days from the date of the newspaper notice, written comments concerning the application and a written request for an opportunity to be heard. The applicant shall promptly furnish a copy of the notice to the Securities and Corporate Practices Division, and to bank shareholders.

§ 19.123 Informal hearing.

(a) *Conduct of proceeding.* The adjudicative provisions of the Administrative Procedure Act, formal rules of evidence and subpart A of this part do not apply to hearings conducted under this subpart, except as provided in § 19.100(b).

(b) *Notice of hearing.* Following the comment period, the Comptroller shall send a notice which fixes a date, time and place for hearing to each applicant and to any person who has requested an opportunity to be heard.

(c) *Presiding officer.* The Comptroller shall designate a presiding officer to conduct the hearing. The presiding officer shall determine all procedural questions not governed by this subpart and may limit the number of witnesses and impose time and presentation limitations as are deemed reasonable. At the conclusion of the informal hearing, the presiding officer shall issue a recommended decision to the Comptroller as to whether the exemption should issue. The decision shall include a summary of the facts and arguments of the parties.

(d) *Attendance.* The applicant and any person who has requested an opportunity to be heard may attend the hearing, with or without counsel. The hearing shall be open to the public. In addition, the applicant and any other hearing participant may introduce oral testimony through such witnesses as the presiding officer shall permit.

(e) *Order of presentation.* (1) The applicant may present an opening statement of a length decided by the presiding officer. Then each of the hearing participants, or one among them selected with the approval of the presiding officer, may present an opening statement. The opening statement should summarize concisely what the applicant and each participant intends to show.

(2) The applicant shall have an opportunity to make an oral presentation of facts and materials or submit written materials for the record. One or more of the hearing participants may make an oral presentation or a written submission.

(3) After the above presentations, the applicant, followed by one or more of the hearing participants, may make concise summary statements reviewing their position.

(f) *Witnesses.* The obtaining and use of witnesses is the responsibility of the parties afforded the hearing. All witnesses shall be present on their own volition, but any person appearing as a witness may be questioned by each applicant, any hearing participant, and the presiding officer. Witnesses shall be sworn unless otherwise directed by the presiding officer.

(g) *Evidence.* The presiding officer may exclude data or materials deemed to be improper or irrelevant. Formal rules of evidence do not apply. Documentary material must be of a size consistent with ease of handling and filing. The presiding officer may determine the number of copies that must be furnished for purposes of the hearing.

(h) *Transcript.* A transcript of each proceeding will be arranged by the OCC, with all expenses, including the furnishing of a copy to the presiding officer, being borne by the applicant.

§ 19.124 Decision of the Comptroller.

Following the conclusion of the hearing and the submission of the record and the presiding officer's recommended decision to the Comptroller for decision, the Comptroller shall notify the applicant and all persons who have so requested in writing of the final disposition of the application. Exemptions granted must be in the form of an order which specifies the type of exemption granted and its terms and conditions.

Subpart E—Disciplinary Proceedings Involving the Federal Securities Laws

§ 19.130 Scope.

(a) Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 15B(c)(5), 15C(c)(2)(A), 17A(c)(3), and 17A(c)(4)(C) of the Exchange Act (15 U.S.C. 78o–4(c)(5), 78o–5(c)(2)(A), 78q–1(c)(3)(A), and 78q–1(c)(4)(C)), to take disciplinary action against the following:

(1) A bank which is a municipal securities dealer, or any person associated or seeking to become associated with such a municipal securities dealer;

(2) A bank which is a government securities broker or dealer, or any person associated with such government securities broker or dealer; or

(3) A bank which is a transfer agent, or any person associated or seeking to become associated with such transfer agent.

(b) In addition to the issuance of disciplinary orders after opportunity for hearing, the Comptroller or the Comptroller's delegate may issue and serve any notices and temporary or permanent cease-and-desist orders and take any actions that are authorized by section 8 of the FDIA (12 U.S.C. 1818), sections 15B(c)(5), 15C(c)(2)(B), and 17A(d)(2) of the Exchange Act, and other subparts of this part against the following:

(1) The parties listed in paragraph (a) of this section; and

(2) A bank which is a clearing agency.

(c) Nothing in this subpart impairs the powers conferred on the Comptroller by other provisions of law.

§ 19.131 Notice of charges and answer.

(a) Proceedings are commenced when the Comptroller serves a notice of charges on a bank or associated person. The notice must indicate the type of disciplinary action being contemplated and the grounds therefor, and fix a date, time and place for hearing. The hearing must be set for a date at least 30 days after service of the notice. A party served with a notice of charges may file an answer as prescribed in § 19.19. Any party who fails to appear at a hearing personally or by a duly authorized representative shall be deemed to have consented to the issuance of a disciplinary order.

(b) All proceedings under this subpart must be commenced, and the notice of charges must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), a request for a private hearing may be filed within 20 days of service of the notice.

§ 19.132 Disciplinary orders.

(a) In the event of consent, or if on the record filed by the administrative law judge, the Comptroller finds that any act or omission or violation specified in the notice of charges has been established, the Comptroller may serve on the bank or persons concerned a disciplinary order, as provided in the Exchange Act. The order may:

(1) Censure, limit the activities, functions or operations, or suspend or revoke the registration of a bank which is a municipal securities dealer;

(2) Censure, suspend or bar any person associated or seeking to become associated with a municipal securities dealer;

(3) Censure, limit the activities, functions or operations, or suspend or bar a bank which is a government securities broker or dealer;

(4) Censure, limit the activities, functions or operations, or suspend or bar any person associated with a government securities broker or dealer;

(5) Deny registration to, limit the activities, functions, or operations or suspend or revoke the registration of a bank which is a transfer agent; or

(6) Censure or limit the activities or functions, or suspend or bar, any person associated or seeking to become associated with a transfer agent.

(b) A disciplinary order is effective when served on the party or parties involved and remains effective and enforceable until it is stayed, modified, terminated, or set aside by action of the Comptroller or a reviewing court.

§ 19.135 Applications for stay or review of disciplinary actions imposed by registered clearing agencies.

(a) *Stays.* The rules adopted by the Securities and Exchange Commission (SEC) pursuant to section 19 of the Securities Exchange Act of 1934 (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for stays of disciplinary sanctions or summary suspensions imposed by registered clearing agencies (17 CFR 240.19d–2) apply to applications by national banks. References to the ''Commission'' are deemed to refer to the ''OCC.''

(b) *Reviews.* The regulations adopted by the SEC pursuant to section 19 of the Securities Exchange Act of 1934 (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for reviews of final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by registered clearing agencies (17 CFR 240.19d–3(a)–(f)) apply to applications by national banks. References to the ''Commission'' are deemed to refer to the ''OCC.''

Subpart F—Civil Money Penalty Authority Under the Securities Laws

§ 19.140 Scope.

(a) Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in section 21B of the Exchange Act (15 U.S.C. 78u–2), in proceedings commenced pursuant to sections 15B, 15C, and 17A of the Exchange Act (15 U.S.C. 78o–4, 78o–5, or 78q–1) for which the OCC is the appropriate regulatory agency under section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)), the Comptroller may impose a civil money penalty against the following:

(1) A bank which is a municipal securities dealer, or any person associated or seeking to become associated with such a municipal securities dealer;

(2) A bank which is a government securities broker or dealer, or any person associated with such government securities broker or dealer; or

(3) A bank which is a transfer agent, or any person associated or seeking to become associated with such transfer agent.

(b) All proceedings under this subpart must be commenced, and the notice of assessment must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing must be filed within 20 days of service of the notice.

Subpart G—Cease-and-Desist Authority Under the Securities Laws

§ 19.150 Scope.

(a) Except as provided in this subpart, subpart A of this part applies to proceedings by the Comptroller to determine whether, pursuant to authority contained in sections 12(i) and 21C of the Exchange Act (15 U.S.C. 78*l*(i) and 78u–3), the Comptroller may initiate cease-and-desist proceedings against a national bank for violations of sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act or regulations or rules issued thereunder (15 U.S.C. 78*l,* 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p).

(b) All proceedings under this subpart must be commenced, and the notice of charges must be filed, on a public basis, unless otherwise ordered by the Comptroller. Pursuant to § 19.33(a), any request for a private hearing must be filed within 20 days of service of the notice.

Subpart H—Change in Bank Control

§ 19.160 Scope.

(a) Section 7(j) of the FDIA (12 U.S.C. 1817(j)) provides that no person may acquire control of an insured depository institution unless the appropriate Federal bank regulatory agency has been given prior written notice of the proposed acquisition. If, after investigating and soliciting comment on the proposed acquisition, the agency decides that the acquisition should be disapproved, the agency shall mail a written notification to the proposed acquiring person in writing within three days of the decision. The party can then request an agency hearing on the proposed acquisition. The OCC's procedures for reviewing notices of proposed acquisitions in change-in-control proceedings are set forth in § 5.50 of this chapter.

(b) Unless otherwise provided in this subpart, the rules in subpart A of this part set forth the procedures applicable to requests for OCC hearings.

§ 19.161 Notice of disapproval and hearing initiation.

(a) *Notice of disapproval.* The OCC's written disapproval of a proposed acquisition of control of a national bank must:

(1) Contain a statement of the basis for the disapproval; and

(2) Indicate that the filer may request a hearing.

(b) *Hearing request.* Following receipt of a notice of disapproval, a filer may request a hearing on the proposed acquisition. A hearing request must:

(1) Be in writing; and

(2) Be filed with the Hearing Clerk of the OCC within ten days after service on the filer of the notice of disapproval. If a filer fails to request a hearing with a timely written request, the notice of disapproval constitutes a final and unappealable order.

(c) *Hearing order.* Following receipt of a hearing request, the Comptroller shall issue, within 20 days, an order that sets forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) The matters of fact or law upon which the disapproval is based; and

(3) The requirement for filing an answer to the hearing order with OFIA within 20 days after service of the hearing order.

(d) *Answer.* An answer to a hearing order must specifically deny those portions of the order that are disputed. Those portions of the order that the filer does not specifically deny are deemed admitted by the filer. Any hearing under this subpart is limited to those portions of the order that are specifically denied.

(e) *Effect of failure to answer.* Failure of a filer to file an answer within 20 days after service of the hearing order constitutes a waiver of the filer's right to appear and contest the allegations in the hearing order. If a filer does not file a timely answer, enforcement counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the

hearing order. Any final order issued by the Comptroller based upon a filer's failure to answer is deemed to be an order issued upon consent and is a final and unappealable order.

Subpart I—Discovery Depositions and Subpoenas

§ 19.170 Discovery depositions.

(a) *General rule.* In any proceeding instituted under or subject to the provisions of subpart A of this part, a party may take the deposition of an expert, or of a person, including another party, who has direct knowledge of matters that are non-privileged, relevant, and material to the proceeding, and where there is need for the deposition. The deposition of experts shall be limited to those experts who are expected to testify at the hearing.

(b) *Notice.* A party desiring to take a deposition shall give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time and place for taking the deposition, and the name and address of the person to be deposed.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than ten days before the scheduled hearing date, except with permission of the administrative law judge for good cause shown.

(d) *Conduct of the deposition.* The witness must be duly sworn, and each party will have the right to examine the witness with respect to all non-privileged, relevant, and material matters of which the witness has factual, direct, and personal knowledge. Objections to questions or exhibits must be in short form and must state the grounds for the objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented.

(e) *Recording the testimony*—(1) *Generally.* The party taking the deposition must have a certified court reporter record the witness's testimony:

(i) By stenotype machine or electronic sound recording device;

(ii) Upon agreement of the parties, by any other method; or

(iii) For good cause and with leave of the administrative law judge, by any other method.

(2) *Cost.* The party taking the deposition must bear the cost of the recording and transcribing the witness's testimony.

(3) *Transcript.* Unless the parties agree that a transcription is not necessary, the court reporter must provide a transcript of the witness's testimony to the party taking the deposition and must make a copy of the transcript available to each party upon payment by that party of the cost of the copy.

(f) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The administrative law judge shall grant such protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, irrelevant, or immaterial matters;

(3) Involves unwarranted attempts to pry into a party's preparation for trial; or

(4) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the witness.

(g) *Fees.* Deposition witnesses, including expert witnesses, shall be paid the same expenses in the same manner as are paid witnesses in the district courts of the United States in proceedings in which the United States is a party. Expenses in accordance with this paragraph shall be paid by the party seeking to take the deposition.

§ 19.171 Deposition subpoenas.

(a) *Issuance.* At the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a discovery deposition under paragraph (a) of this section. The attendance of a witness may be required from any place in any state or territory that is subject to the jurisdiction of the United States or as otherwise permitted by law.

(b) *Service*—(1) *Methods of service.* The party requesting the subpoena must serve it on the person named therein, or on that person's counsel, by any of the methods identified in § 19.11(d).

(2) *Proof of service.* The party serving the subpoena must file proof of service with the administrative law judge.

(c) *Motion to quash.* A person named in a subpoena may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party which requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(d) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures of § 19.27(d).

Subpart J—Formal Investigations

§ 19.180 Scope.

This subpart and § 19.8 apply to formal investigations initiated by order of the Comptroller or the Comptroller's delegate and pertain to the exercise of powers specified in 12 U.S.C. 481, 1818(n) and 1820(c), and section 21 of the Exchange Act (15 U.S.C. 78u). This subpart does not restrict or in any way affect the authority of the Comptroller to conduct examinations into the affairs or ownership of banks and their affiliates.

§ 19.181 Confidentiality of formal investigations.

Information or documents obtained in the course of a formal investigation are confidential and may be disclosed only in accordance with the provisions of part 4 of this chapter.

§ 19.182 Order to conduct a formal investigation.

A formal investigation begins with the issuance of an order signed by the Comptroller or the Comptroller's delegate. The order must designate the person or persons who will conduct the investigation. Such persons are authorized, among other things, to issue subpoenas duces tecum, to administer oaths, and receive affirmations as to any matter under investigation by the Comptroller. Upon application and for good cause shown, the Comptroller may limit, modify, or withdraw the order at any stage of the proceedings.

§ 19.183 Rights of witnesses.

(a) Any person who is compelled or requested to furnish testimony, documentary evidence, or other information with respect to any matter under formal investigation shall, on request, be shown the order initiating the investigation.

(b) Any person who, in a formal investigation, is compelled to appear and testify, or who appears and testifies by request or permission of the Comptroller, may be accompanied, represented, and advised by counsel. The right to be accompanied, represented, and advised by counsel means the right of a person testifying to have an attorney present at all times while testifying and to have the attorney—

(1) Advise the person before, during and after the conclusion of testimony;

(2) Question the person briefly at the conclusion of testimony to clarify any of the answers given; and

(3) Make summary notes during the testimony solely for the use of the person.

(c) Any person who has given or will give testimony and counsel representing the person may be excluded from the proceedings during the taking of testimony of any other witness.

(d) Any person who is compelled to give testimony is entitled to inspect any transcript that has been made of the testimony but may not obtain a copy if the Comptroller's representatives conducting the proceedings have cause to believe that the contents should not be disclosed pending completion of the investigation.

(e) Any designated representative conducting an investigative proceeding shall report to the Comptroller any instances where a person has been guilty of dilatory, obstructionist or insubordinate conduct during the course of the proceeding or any other instance involving a violation of this part. The Comptroller may take such action as the circumstances warrant, including exclusion of the offending individual or individuals from participation in the proceedings.

§ 19.184 Service of subpoena and payment of witness expenses.

(a) *Methods of service.* Service of a subpoena may be made by any of the methods identified in § 19.11(d).

(b) *Expenses.* A witness who is subpoenaed will be paid the same expenses in the same manner as witnesses in the district courts of the United States. The expenses need not be tendered at the time a subpoena is served.

Subpart K—Parties and Representational Practice Before the OCC; Standards of Conduct

§ 19.190 Scope.

This subpart contains rules relating to parties and representational practice before the OCC. This subpart includes the imposition of sanctions by the administrative law judge, any other presiding officer appointed pursuant to subparts C and D of this part, or the Comptroller against parties or their counsel in an adjudicatory proceeding under this part. This subpart also covers other disciplinary sanctions—censure, suspension or debarment—against individuals who appear before the OCC in a representational capacity either in an adjudicatory proceeding under this part or in any other matters connected with presentations to the OCC relating to a client's rights, privileges, or liabilities. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees of the OCC are not subject to disciplinary proceedings under this subpart.

§ 19.191 Definitions.

As used in §§ 19.190 through 19.201, the following terms shall have the meaning given in this section unless the context otherwise requires:

(a) *Practice before the OCC* includes any matters connected with presentations to the OCC or any of its officers or employees relating to a client's rights, privileges or liabilities under laws or regulations administered by the OCC. Such matters include, but are not limited to, representation of a client in an adjudicatory proceeding under this part; the preparation of any statement, opinion or other paper or document by an attorney, accountant, or other licensed professional which is filed with, or submitted to, the OCC, on behalf of another person in, or in connection with, any application, notification, report or document; the representation of a person at conferences, hearings and meetings; and the transaction of other business before the OCC on behalf of another person. The term ''practice before the OCC'' does not include work prepared for a bank solely at its request for use in the ordinary course of its business.

(b) *Attorney* means any individual who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth, of the United States or the District of Columbia.

(c) *Accountant* means any individual who is duly qualified to practice as a certified public accountant or a public accountant in any state, possession, territory, commonwealth of the United States, or the District of Columbia.

§ 19.192 Sanctions relating to conduct in an adjudicatory proceeding.

(a) *General rule.* Appropriate sanctions may be imposed when any party or person representing a party in an adjudicatory proceeding under this part has failed to comply with an applicable statute, regulation, or order, and that failure to comply:

(1) Constitutes contemptuous conduct;

(2) Materially injures or prejudices another party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Unduly delays the proceeding.

(b) *Sanctions.* Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that are just; and

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Procedure for imposition of sanctions.* (1) Upon the motion of any party, or on his or her own motion, the administrative law judge or other presiding officer may impose sanctions in accordance with this section. The administrative law judge or other presiding officer shall submit to the Comptroller for final ruling any sanction entering a final order that determines the case on the merits.

(2) No sanction authorized by this section, other than refusal to accept late filings, shall be imposed without prior notice to all parties and an opportunity for any party against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form as the administrative law judge or other presiding officer directs. The administrative law judge or other presiding officer may limit the opportunity to be heard to an opportunity of a party or a party's representative to respond orally immediately after the act or inaction covered by this section is noted by the administrative law judge or other presiding officer.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, are subject to interlocutory review pursuant to § 19.25 in the same manner as any other ruling.

(d) *Section not exclusive.* Nothing in this section shall be read as precluding the administrative law judge or other presiding officer or the Comptroller from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

§ 19.193 Censure, suspension or debarment.

The Comptroller may censure an individual or suspend or debar such individual from practice before the OCC if he or she is incompetent in representing a client's rights or interest in a significant matter before the OCC; or engages, or has engaged, in disreputable conduct; or refuses to comply with the rules and regulations in this part; or with intent to defraud in any manner, willfully and knowingly deceives, misleads, or threatens any client or prospective client. The suspension or debarment of an individual may be initiated only upon a finding by the Comptroller that the basis for the disciplinary action is sufficiently egregious.

§ 19.194 Eligibility of attorneys and accountants to practice.

(a) *Attorneys.* Any attorney who is qualified to practice as an attorney and is not currently under suspension or debarment pursuant to this subpart may practice before the OCC.

(b) *Accountants.* Any accountant who is qualified to practice as a certified public accountant or public accountant and is not currently under suspension or debarment by the OCC may practice before the OCC.

§ 19.195 Incompetence.

Incompetence in the representation of a client's rights and interests in a significant matter before the OCC is grounds for suspension or debarment. The term ''incompetence'' encompasses conduct that reflects a lack of the knowledge, judgment and skill that a professional would ordinarily and reasonably be expected to exercise in adequately representing the rights and interests of a client. Such conduct includes, but is not limited to:

(a) Handling a matter which the individual knows or should know that he or she is not competent to handle, without associating with a professional who is competent to handle such matter.

(b) Handling a matter without adequate preparation under the circumstances.

(c) Neglect in a matter entrusted to him or her.

§ 19.196 Disreputable conduct.

Disreputable conduct for which an individual may be censured, debarred, or suspended from practice before the OCC includes:

(a) Willfully or recklessly violating or willfully or recklessly aiding and abetting the violation of any provision of the Federal banking or applicable securities laws or the rules and regulations thereunder or conviction of any offense involving dishonesty or breach of trust;

(b) Knowingly or recklessly giving false or misleading information, or participating in any way in the giving of false information to the OCC or any officer or employee thereof, or to any tribunal authorized to pass upon matters administered by the OCC in connection with any matter pending or likely to be pending before it. The term ''information'' includes facts or other statements contained in testimony, financial statements, applications for enrollment, affidavits, declarations, or any other document or written or oral statement;

(c) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the OCC by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor, or thing of value.

(d) Disbarment or suspension from practice as an attorney, or debarment or suspension from practice as a certified public accountant or public accountant, by any duly constituted authority of any state, possession, or commonwealth of the United States, or the District of Columbia for the conviction of a felony or misdemeanor involving moral turpitude in matters relating to the supervisory responsibilities of the OCC, where the conviction has not been reversed on appeal.

(e) Knowingly aiding or abetting another individual to practice before the OCC during that individual's period of suspension, debarment, or ineligibility.

(f) Contemptuous conduct in connection with practice before the OCC, and knowingly making false accusations and statements, or circulating or publishing malicious or libelous matter.

(g) Suspension, debarment or removal from practice before the Board of Governors, the FDIC, the OTS, the Securities and Exchange Commission, the Commodity Futures Trading Commission, or any other Federal or state agency; and

(h) Willful violation of any of the regulations contained in this part.

§ 19.197 Initiation of disciplinary proceeding.

(a) *Receipt of information.* An individual, including any employee of the OCC, who has reason to believe that an individual practicing before the OCC in a representative capacity has engaged in any conduct that would serve as a basis for censure, suspension or debarment under § 19.192, may make a report thereof and forward it to the OCC or to such person as may be delegated responsibility for such matters by the Comptroller.

(b) *Censure without formal proceeding.* Upon receipt of information regarding an individual's qualification to practice before the OCC, the Comptroller or the Comptroller's delegate may, after giving the individual notice and opportunity to respond, censure such individual.

(c) *Institution of formal disciplinary proceeding.* When the Comptroller has reason to believe that any individual who practices before the OCC in a representative capacity has engaged in conduct that would serve as a basis for censure, suspension or debarment under § 19.192, the Comptroller may, after giving the individual notice and opportunity to respond, institute a formal disciplinary proceeding against such individual. The proceeding will be conducted pursuant to § 19.199 and initiated by a complaint which names the individual as a respondent and is signed by the Comptroller or the Comptroller's delegate. Except in cases of willfulness, or when time, the nature of the proceeding, or the public interest do not permit, a proceeding under this section may not be commenced until the respondent has been informed, in writing, of the facts or conduct which warrant institution of a proceeding and the respondent has been accorded the opportunity to comply with all lawful requirements or take whatever action may be necessary to remedy the conduct that is the basis for the commencement of the proceeding.

§ 19.198 Conferences.

(a) *General.* The Comptroller may confer with a proposed respondent concerning allegations of misconduct or other grounds for censure, debarment or suspension, regardless of whether a proceeding for debarment or suspension has been commenced. If a conference results in a stipulation in connection with a proceeding in which the individual is the respondent, the stipulation may be entered in the record at the request of either party to the proceeding.

(b) *Resignation or voluntary suspension.* In order to avoid the institution of, or a decision in, a debarment or suspension proceeding, a person who practices before the OCC may consent to suspension from practice. At the discretion of the Comptroller, the individual may be suspended or debarred in accordance with the consent offered.

§ 19.199 Proceedings under this subpart.

Any hearing held under this subpart is held before an administrative law judge pursuant to procedures set forth in subpart A of this part. The Comptroller or the Comptroller's delegate shall appoint a person to represent the OCC in the hearing. Any person having prior involvement in the matter which is the basis for the suspension or debarment proceeding is disqualified from representing the OCC in the hearing. The hearing will be closed to the public unless the Comptroller on his or her own initiative, or on the request of a party, otherwise directs. The administrative law judge shall issue a recommended decision to the Comptroller who shall issue the final decision and order. The Comptroller may censure, debar or suspend an individual, or take such other disciplinary action as the Comptroller deems appropriate.

§ 19.200 Effect of suspension, debarment or censure.

(a) *Debarment.* If the final order against the respondent is for debarment, the individual may not practice before the OCC unless otherwise permitted to do so by the Comptroller.

(b) S*uspension.* If the final order against the respondent is for suspension, the individual may not practice before the OCC during the period of suspension.

(c) *Censure.* If the final order against the respondent is for censure, the individual may be permitted to practice before the OCC, but such individual's future representations may be subject to conditions designed to promote high standards of conduct. If a written letter of censure is issued, a copy will be maintained in the OCC's files.

(d) *Notice of debarment or suspension.* Upon the issuance of a final order for suspension or debarment, the Comptroller shall give notice of the order to appropriate officers and employees of the OCC and to interested departments and agencies of the Federal government. The Comptroller or the Comptroller's delegate shall also give notice to the appropriate authorities of the state in which any debarred or suspended individual is or was licensed to practice.

§ 19.201 Petition for reinstatement.

At the expiration of the period of time designated in the order of debarment, the Comptroller may entertain a petition for reinstatement from any person debarred from practice before the OCC. The Comptroller may grant reinstatement only if satisfied that the petitioner is likely to act in accordance with the regulations in this part, and that granting reinstatement would not be contrary to the public interest. Any request for reinstatement shall be limited to written submissions unless the Comptroller, in his or her discretion, affords the petitioner a hearing.

Subpart L—Equal Access to Justice Act

§ 19.210 Scope.

The Equal Access to Justice Act regulations applicable to formal OCC adjudicatory proceedings under this part are set forth at 31 CFR part 6.

Subpart M—Procedures for Reclassifying a Bank Based on Criteria Other Than Capital

§ 19.220 Scope.

This subpart applies to the procedures afforded to any bank that has been reclassified to a lower capital category by a notice or order issued by the OCC pursuant to section 38 of the Federal Deposit Insurance Act and this part.

§ 19.221 Reclassification of a bank based on unsafe or unsound condition or practice.

(a) *Issuance of notice of proposed reclassification*—(1) *Grounds for reclassification.* (i) Pursuant to § 6.4 of this chapter, the OCC may reclassify a well capitalized bank as adequately capitalized or subject an adequately capitalized bank or undercapitalized bank to the supervisory actions applicable to the next lower capital category if:

(A) The OCC determines that the bank is in an unsafe or unsound condition; or

(B) The OCC deems the bank to be engaging in an unsafe or unsound practice and not to have corrected the deficiency.

(ii) Any action pursuant to this paragraph (a)(1) shall hereinafter be referred to as ''reclassification.''

(2) *Prior notice to institution.* Prior to taking action pursuant to § 6.4 of this chapter, the OCC shall issue and serve on the bank a written notice of the OCC's intention to reclassify the bank.

(b) *Contents of notice.* A notice of intention to reclassify a bank based on unsafe or unsound condition will include:

(1) A statement of the bank's capital measures and capital levels and the category to which the bank would be reclassified;

(2) The reasons for reclassification of the bank;

(3) The date by which the bank subject to the notice of reclassification may file with the OCC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the bank or other relevant circumstances.

(c) *Response to notice of proposed reclassification.* A bank may file a written response to a notice of proposed reclassification within the time period set by the OCC. The response should include:

(1) An explanation of why the bank is not in unsafe or unsound condition or otherwise should not be reclassified;

(2) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the bank or company regarding the reclassification.

(d) *Failure to file response.* Failure by a bank to file, within the specified time period, a written response with the OCC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(e) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the OCC under this section. If the bank desires to present oral testimony or witnesses at the hearing, the bank shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(f) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the bank. The hearing shall be held in Washington, DC or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(g) *Hearing procedures.* (1) The bank shall have the right to introduce relevant written materials and to present oral argument at the hearing. The bank may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C.

554–557) governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript furnished to the bank upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(h) *Recommendation of presiding officer(s).* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC on the reclassification.

(i) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will decide whether to reclassify the bank and notify the bank of the OCC's decision.

§ 19.222 Request for rescission of reclassification.

Any bank that has been reclassified under part 6 of this chapter and this subpart, may, upon a change in circumstances, request in writing that the OCC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OCC, the bank shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OCC.

Subpart N—Order To Dismiss a Director or Senior Executive Officer

§ 19.230 Scope.

This subpart applies to informal hearings afforded to any director or senior executive officer dismissed pursuant to an order issued under 12 U.S.C. 1831o and part 6 of this chapter.

§ 19.231 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the OCC issues and serves a directive on a bank pursuant to subpart B of part 6 of this chapter requiring the bank to dismiss from office any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the OCC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the OCC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement shall include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the OCC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the OCC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a bank to dismiss from office any director or senior executive officer, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor the Uniform Rules of Practice and Procedure in subpart A of this part apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(2) The informal hearing shall be recorded, and a transcript furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the bank would materially strengthen the bank's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the bank's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the bank based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officer.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC concerning the Respondent's request for reinstatement with the bank.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC shall grant or deny the request for reinstatement and notify the Respondent of the OCC's decision. If the OCC denies the request for reinstatement, the OCC shall set forth in the notification the reasons for the OCC's action.

Subpart O—Civil Money Penalty Adjustments

§ 19.240 Inflation adjustments.

(a) *Statutory formula to calculate inflation adjustments.* The OCC is required by statute to annually adjust

for inflation the maximum amount of each civil money penalty within its jurisdiction to administer. The inflation adjustment is calculated by multiplying the maximum dollar amount of the civil money penalty for the previous calendar year by the cost-of-living inflation adjustment multiplier provided annually by the Office of Management and Budget and rounding the total to the nearest dollar.

(b) *Notice of inflation adjustments.* The OCC will publish notice in the **Federal Register** of the maximum penalties which may be assessed on an annual basis on or before January 15 of each calendar year based on the formula in paragraph (a) of this section, for penalties assessed on, or after, the date of publication of the most recent notice related to conduct occurring on, or after, November 2, 2015.

Subpart P—Removal, Suspension, and Debarment of Accountants From Performing Audit Services

§ 19.241 Scope.

This subpart, which implements section 36(g)(4) of the FDIA (12 U.S.C. 1831m(g)(4)), provides rules and procedures for the removal, suspension, or debarment of independent public accountants and their accounting firms from performing independent audit and attestation services required by section 36 of the FDIA (12 U.S.C. 1831m) for insured national banks, insured Federal savings associations, and insured Federal branches of foreign banks.

§ 19.242 Definitions.

As used in this subpart, the following terms have the meaning given below unless the context requires otherwise:

(a) *Accounting firm* means a corporation, proprietorship, partnership, or other business firm providing audit services.

(b) *Audit services* means any service required to be performed by an independent public accountant by section 36 of the FDIA (12 U.S.C. 1831m) and 12 CFR part 363, including attestation services.

(c) *Independent public accountant (accountant)* means any individual who performs or participates in providing audit services.

§ 19.243 Removal, suspension, or debarment.

(a) *Good cause for removal, suspension, or debarment*—(1) *Individuals.* The Comptroller may remove, suspend, or debar an independent public accountant from performing audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks that are subject to section 36 of the FDIA (12 U.S.C. 1831m) if, after service of a notice of intention and opportunity for hearing in the matter, the Comptroller finds that the accountant:

(i) Lacks the requisite qualifications to perform audit services;

(ii) Has knowingly or recklessly engaged in conduct that results in a violation of applicable professional standards, including those standards and conflicts of interest provisions applicable to accountants through the Sarbanes-Oxley Act of 2002, Public Law 107–204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act), and developed by the Public Company Accounting Oversight Board and the Securities and Exchange Commission;

(iii) Has engaged in negligent conduct in the form of:

(A) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or

(B) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to perform audit services;

(iv) Has knowingly or recklessly given false or misleading information, or knowingly or recklessly participated in any way in the giving of false or misleading information, to the OCC or any officer or employee of the OCC;

(v) Has engaged in, or aided and abetted, a material and knowing or reckless violation of any provision of the Federal banking or securities laws or the rules and regulations thereunder, or any other law;

(vi) Has been removed, suspended, or debarred from practice before any Federal or State agency regulating the banking, insurance, or securities industries, other than by an action listed in § 19.244, on grounds relevant to the provision of audit services; or

(vii) Is suspended or debarred for cause from practice as an accountant by any duly constituted licensing authority of any State, possession, commonwealth, or the District of Columbia.

(2) *Accounting firms.* If the Comptroller determines that there is good cause for the removal, suspension, or debarment of a member or employee of an accounting firm under paragraph (a)(1) of this section, the Comptroller also may remove, suspend, or debar such firm or one or more offices of such firm. In considering whether to remove, suspend, or debar a firm or an office thereof, and the term of any sanction against a firm under this section, the Comptroller may consider, for example:

(i) The gravity, scope, or repetition of the act or failure to act that constitutes good cause for the removal, suspension, or debarment;

(ii) The adequacy of, and adherence to, applicable policies, practices, or procedures for the accounting firm's conduct of its business and the performance of audit services;

(iii) The selection, training, supervision, and conduct of members or employees of the accounting firm involved in the performance of audit services;

(iv) The extent to which managing partners or senior officers of the accounting firm have participated, directly, or indirectly through oversight or review, in the act or failure to act; and

(v) The extent to which the accounting firm has, since the occurrence of the act or failure to act, implemented corrective internal controls to prevent its recurrence.

(3) *Limited scope orders.* An order of removal, suspension (including an immediate suspension), or debarment may, at the discretion of the Comptroller, be made applicable to a particular insured national bank, insured Federal savings association, or insured Federal branch of a foreign bank or class of insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks.

(4) *Remedies not exclusive.* The remedies provided in this subpart are in addition to any other remedies the OCC may have under any other applicable provisions of law, rule, or regulation.

(b) *Proceedings to remove, suspend, or debar*—(1) *Initiation of formal removal, suspension, or debarment proceedings.* The Comptroller may initiate a proceeding to remove, suspend, or debar an accountant or accounting firm from performing audit services by issuing a written notice of intention to take such action that names the individual or firm as a respondent and describes the nature of the conduct that constitutes good cause for such action.

(2) *Hearings under paragraph (b) of this section.* An accountant or firm named as a respondent in the notice issued under paragraph (b)(1) of this section may request a hearing on the allegations in the notice. Hearings conducted under this paragraph will be conducted in the same manner as other hearings under the Uniform Rules of Practice and Procedure (12 CFR part 19, subpart A), subject to the limitations in § 19.243(c)(4).

(c) *Immediate suspension from performing audit services*—(1) *In general.* If the Comptroller serves a written notice of intention to remove, suspend, or debar an accountant or accounting firm from performing audit services, the Comptroller may, with due regard for the public interest and without a preliminary hearing, immediately suspend such accountant or firm from performing audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks, if the Comptroller:

(i) Has a reasonable basis to believe that the accountant or firm has engaged in conduct (specified in the notice served on the accountant or firm under paragraph (b) of this section) that would constitute grounds for removal, suspension, or debarment under paragraph (a) of this section;

(ii) Determines that immediate suspension is necessary to avoid immediate harm to an insured depository institution or its depositors or to the depository system as a whole; and

(iii) Serves such respondent with written notice of the immediate suspension.

(2) *Procedures.* An immediate suspension notice issued under this paragraph will become effective upon service. Such suspension will remain in effect until the date the Comptroller dismisses the charges contained in the notice of intention, or the effective date of a final order of removal, suspension, or debarment issued by the Comptroller to the respondent.

(3) *Petition for stay.* Any accountant or firm immediately suspended from performing audit services in accordance with paragraph (c)(1) of this section may, within 10 calendar days after service of the notice of immediate suspension, file with the Office of the Comptroller of the Currency, Washington, DC 20219 for a stay of such immediate suspension. If no petition is filed within 10 calendar days, the right to a petition is waived and the immediate suspension remains in effect pursuant to paragraph (c)(2).

(4) *Hearing on petition.* Upon receipt of a stay petition, the Comptroller will designate a presiding officer who will fix a place and time (not more than 10 calendar days after receipt of the petition, unless further time is allowed by the presiding officer at the request of petitioner) at which the immediately suspended party may appear, personally or through counsel, to submit written materials and oral argument. Any OCC employee engaged in investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, serve as a presiding officer or participate or advise in the decision of the presiding officer or of the OCC, except as witness or counsel in the proceeding. In the sole discretion of the presiding officer, upon a specific showing of compelling need, oral testimony of witnesses may also be presented. In hearings held pursuant to this paragraph there will be no discovery and the provisions of §§ 19.6 through 19.12, 19.16, and 19.21 of this part apply.

(5) *Decision on petition.* Within 30 calendar days after the hearing, the presiding officer will issue a decision. The presiding officer will grant a stay upon a demonstration that a substantial likelihood exists of the respondent's success on the issues raised by the notice of intention and that, absent such relief, the respondent will suffer immediate and irreparable injury, loss, or damage. In the absence of such a demonstration, the presiding officer will notify the parties that the immediate suspension will be continued pending the completion of the administrative proceedings pursuant to the notice.

(6) *Review of presiding officer's decision.* The parties may seek review of the presiding officer's decision by filing a petition for review with the presiding officer within 10 calendar days after service of the decision. Replies must be filed within 10 calendar days after the petition filing date. Upon receipt of a petition for review and any reply, the presiding officer will promptly certify the entire record to the Comptroller. Within 60 calendar days of the presiding officer's certification, the Comptroller will issue an order notifying the affected party whether or not the immediate suspension should be continued or reinstated. The order will state the basis of the Comptroller's decision.

§ 19.244 Automatic removal, suspension, or debarment.

(a) An independent public accountant or accounting firm may not perform audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks if the accountant or firm:

(1) Is subject to a final order of removal, suspension, or debarment (other than a limited scope order) issued by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the former Office of Thrift Supervision under section 36 of the FDIA (12 U.S.C. 1831m).

(2) Is subject to a temporary suspension or permanent revocation of registration or a temporary or permanent suspension or bar from further association with any registered public accounting firm issued by the Public Company Accounting Oversight Board or the Securities and Exchange Commission under sections 105(c)(4)(A) or (B) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(A) or (B)); or

(3) Is subject to an order of suspension or denial of the privilege of appearing or practicing before the Securities and Exchange Commission.

(b) Upon written request, the Comptroller, for good cause shown, may grant written permission to such accountant or firm to perform audit services for insured national banks, insured Federal savings associations, or insured Federal branches of foreign banks. The request must contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

§ 19.245 Notice of removal, suspension, or debarment.

(a) *Notice to the public.* Upon the issuance of a final order for removal, suspension, or debarment of an independent public accountant or accounting firm from providing audit services, the Comptroller will make the order publicly available and provide notice of the order to the other Federal banking agencies.

(b) *Notice to the Comptroller by accountants and firms.* An accountant or accounting firm that provides audit services to a insured national bank, insured Federal savings association, or insured Federal branch of a foreign bank must provide the Comptroller with written notice of:

(1) Any currently effective order or other action described in § 19.243(a)(1)(vi) through (vii) or § 19.244(a)(2) and (3); and

(2) Any currently effective action by the Public Company Accounting Oversight Board under sections 105(c)(4)(C) or (G) of the Sarbanes-Oxley Act (15 U.S.C. 7215(c)(4)(C) or (G)).

(c) *Timing of notice.* Written notice required by this paragraph must be given no later than 15 calendar days following the effective date of an order or action, or 15 calendar days before an accountant or firm accepts an engagement to provide audit services, whichever date is earlier.

§ 19.246 Petition for reinstatement.

(a) *Form of petition.* Unless otherwise ordered by the Comptroller, a petition for reinstatement by an independent

public accountant, an accounting firm, or an office of a firm that was removed, suspended, or debarred under § 19.243 may be made in writing at any time. The request must contain a concise statement of the action requested. The Comptroller may require the applicant to submit additional information.

(b) *Procedure.* A petitioner for reinstatement under this section may, in the sole discretion of the Comptroller, be afforded a hearing. The accountant or firm bears the burden of going forward with a petition and proving the grounds asserted in support of the petition. In reinstatement proceedings, the person seeking reinstatement bears the burden of going forward with an application and proving the grounds asserted in support of the application. The Comptroller may, in his sole discretion, direct that any reinstatement proceeding be limited to written submissions. The removal, suspension, or debarment will continue until the Comptroller, for good cause shown, has reinstated the petitioner or until the suspension period has expired. The filing of a petition for reinstatement will not stay the effectiveness of the removal, suspension, or debarment of an accountant or firm.

PART 108—REMOVALS, SUSPENSIONS, AND PROHIBITIONS WHERE A CRIME IS CHARGED OR PROVEN

Authority: 12 U.S.C. 1464, 1818, 5412(b)(2)(B).

§ 108.1 Scope.

The rules in this part apply to hearings, which are exempt from the adjudicative provisions of the Administrative Procedure Act, afforded to any officer, director, or other person participating in the conduct of the affairs of a Federal savings association, Federal savings association subsidiary, or affiliate service corporation, where such person has been suspended or removed from office or prohibited from further participation in the conduct of the affairs of one of the aforementioned entities by a Notice or Order served by the OCC upon the grounds set forth in section 8(g) of the Federal Deposit Insurance Act, (12 U.S.C. 1818(g)).

§ 108.2 Definitions.

As used in this part—

(a) The term *OCC* means the Office of the Comptroller of the Currency.

(b) [Reserved]

(c) The term *Notice* means a Notice of Suspension or Notice of Prohibition issued by the OCC pursuant to section 8(g) of the Federal Deposit Insurance Act.

(d) The term *Order* means an Order of Removal or Order of Prohibition issued by the OCC pursuant to section 8(g) of the Federal Deposit Insurance Act.

(e) The term *association* means a Federal savings association within the meaning of section 2(5) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1462(5) (''HOLA''), Federal savings association subsidiary and an affiliate service corporation within the meaning of section 8(b)(8) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1818(b)(8) (''FDIA'').

(f) The term *subject individual* means a person served with a Notice or Order.

(g) The term *petitioner* means a subject individual who has filed a petition for informal hearing under this part.

§ 108.3 Issuance of Notice or Order.

(a) The OCC may issue and serve a Notice upon an officer, director, or other person participating in the conduct of the affairs of an association, where the individual is charged in any information, indictment, or complaint with the commission of or participation in a crime involving dishonesty or breach of trust that is punishable by imprisonment for a term exceeding one year under state or Federal law, if the OCC, upon due deliberation, determines that continued service or participation by the individual may pose a threat to the interests of the association's depositors or may threaten to impair public confidence in the association. The Notice shall remain in effect until the information, indictment, or complaint is finally disposed of or until terminated by the OCC.

(b) The OCC may issue and serve an Order upon a subject individual against whom a judgment of conviction, or an agreement to enter a pretrial diversion or other similar program has been rendered, where such judgment is not subject to further appellate review, and the OCC, upon the deliberation, has determined that continued service or participation by the subject individual may pose a threat to the interests of the association's depositors or may threaten to impair public confidence in the association.

§ 108.4 Contents and service of the Notice or Order.

(a) The Notice or Order shall set forth the basis and facts in support of the OCC's issuance of such Notice or Order, and shall inform the subject individual of his right to a hearing, in accordance with this part, for the purpose of determining whether the Notice or Order should be continued, terminated, or otherwise modified.

(b) The OCC shall serve a copy of the Notice or Order upon the subject individual and the related association in the manner set forth in § 109.11 of this chapter.

(c) Upon receipt of the Notice or Order, the subject individual shall immediately comply with the requirements thereof.

§ 108.5 Petition for hearing.

(a) To obtain a hearing, the subject individual must file two copies of a petition with the OCC within 30 days of being served with the Notice or Order.

(b) The petition filed under this section shall admit or deny specifically each allegation in the Notice or Order, unless the petitioner is without knowledge or information, in which case the petition shall so state and the statement shall have the effect of a denial. Any allegation not denied shall be deemed to be admitted. When a petitioner intends in good faith to deny only a part of or to qualify an allegation, he shall specify so much of it as is true and shall deny only the remainder.

(c) The petition shall state whether the petitioner is requesting termination or modification of the Notice or Order, and shall state with particularity how the petitioner intends to show that his continued service to or participation in the conduct of the affairs of the association would not, or is not likely to, pose a threat to the interests of the association's depositors or to impair public confidence in the association.

§ 108.6 Initiation of hearing.

(a) Within 10 days of the filing of a petition for hearing, the OCC shall notify the petitioner of the time and place fixed for hearing, and it shall designate one or more OCC employees to serve as presiding officer.

(b) The hearing shall be scheduled to be held no later than 30 days from the date the petition was filed, unless the time is extended at the request of the petitioner.

(c) A petitioner may appear personally or through counsel, but if represented by counsel, said counsel is required to comply with § 109.6 of this chapter.

(d) A representative(s) of the OCC's Enforcement Division also may attend the hearing and participate therein as a party.

§ 108.7 Conduct of hearings.

(a) Hearings provided by this section are not subject to the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. 554–557). The presiding officer is, however, authorized to exercise all of the powers enumerated in § 109.5 of this chapter.

(b) Witnesses may be presented, within time limits specified by the presiding officer, provided that at least 10 days prior to the hearing date, the party presenting the witnesses furnishes the presiding officer and the opposing party with a list of such witnesses and a summary of the proposed testimony. However, the requirement for furnishing such a witness list and summary of testimony shall not apply to the presentation of rebuttal witnesses. The presiding officer may ask questions of any witness, and each party shall have an opportunity to cross-examine any witness presented by an opposing party.

(c) Upon the request of either the petitioner or a representative of the Enforcement Division, the record shall remain open for a period of 5 business days following the hearing, during which time the parties may make any additional submissions for the record. Thereafter, the record shall be closed.

(d) Following the introduction of all evidence, the petitioner and the representative of the Enforcement Division shall have an opportunity for oral argument; however, the parties may jointly waive the right to oral argument, and, in lieu thereof, elect to submit written argument.

(e) All oral testimony and oral argument shall be recorded, and transcripts made available to the petitioner upon payment of the cost thereof. A copy of the transcript shall be sent directly to the presiding officer, who shall have authority to correct the record *sua sponte* or upon the motion of any party.

(f) The parties may, in writing, jointly waive an oral hearing and instead elect a hearing upon a written record in which all evidence and argument would be submitted to the presiding officer in documentary form and statements of individuals would be made by affidavit.

§ 108.8 Default.

If the subject individual fails to file a petition for a hearing, or fails to appear at a hearing, either in person or by attorney, or fails to submit a written argument where oral argument has been waived pursuant to § 108.7(d) or (f) of this part, the Notice shall remain in effect until the information, indictment, or complaint is finally disposed of and the Order shall remain in effect until terminated by the OCC.

§ 108.9 Rules of evidence.

(a) Formal rules of evidence shall not apply to a hearing, but the presiding officer may limit the introduction of irrelevant, immaterial, or unduly repetitious evidence.

(b) All matters officially noticed by the presiding officer shall appear on the record.

§ 108.10 Burden of persuasion.

The petitioner has the burden of showing, by a preponderance of the evidence, that his or her continued service to or participation in the conduct of the affairs of the association does not, or is not likely to, pose a threat to the interests of the association's depositors or threaten to impair public confidence in the association.

§ 108.11 Relevant considerations.

(a) In determining whether the petitioner has shown that his or her continued service to or participation in the conduct of the affairs of the association would not, or is not likely to, pose a threat to the interests of the association's depositors or threaten to impair public confidence in the association, in order to decide whether the Notice or Order should be continued, terminated, or otherwise modified, the OCC will consider:

(1) The nature and extent of the petitioner's participation in the affairs of the association;

(2) The nature of the offense with which the petitioner has been charged;

(3) The extent of the publicity accorded the indictment and trial; and

(4) Such other relevant factors as may be entered on the record.

(b) When considering a request for the termination or modification of a Notice, the OCC will not consider the ultimate guilt or innocence of the petitioner with respect to the criminal charge that is outstanding.

(c) When considering a request for the termination or modification of an Order which has been issued following a final judgment of conviction against a subject individual, the OCC will not collaterally review such final judgment of conviction.

§ 108.12 Proposed findings and conclusions and recommended decision.

(a) Within 30 days after completion of oral argument or the submission of written argument where oral argument has been waived, the presiding officer shall file with and certify to the OCC for decision the entire record of the hearing, which shall include a recommended decision, the Notice or Order, and all other documents filed in connection with the hearing.

(b) The recommended decision shall contain:

(1) A statement of the issue(s) presented,

(2) A statement of findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record, and

(3) An appropriate recommendation as to whether the suspension, removal, or prohibition should be continued, modified, or terminated.

§ 108.13 Decision of the OCC.

(a) Within 30 days after the recommended decision has been certified to the OCC, the OCC shall issue a final decision.

(b) The OCC's final decision shall contain a statement of the basis therefor. The OCC may satisfy this requirement where it adopts the recommended decision of the presiding officer upon finding that the recommended decision satisfies the requirements of § 109.38 of this chapter.

(c) The OCC shall serve upon the petitioner and the representative of the Enforcement Division a copy of the OCC's final decision and the related recommended decision.

§ 108.14 Miscellaneous.

The provisions of §§ 109.10, 109.11, and 109.12 of this chapter shall apply to proceedings under this part.

PART 109—RULES OF PRACTICE AND PROCEDURE IN ADJUDICATORY PROCEEDINGS

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 1464, 1467, 1467a, 1468, 1817, 1818, 1820(k), 1829(e), 1832, 1884, 1972, 3349, 4717, 5412(b)(2)(B); 15 U.S.C. 78(l), 78o–5, 78u–2, 1639e; 28 U.S.C. 2461 note; 31 U.S.C. 5321; and 42 U.S.C. 4012a.

Subpart A—Uniform Rules of Practice and Procedure

§ 109.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure with regard to Federal savings associations applicable to adjudicatory proceedings as to which hearings on the record are provided for by the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the OCC should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78o–

5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the OCC is the appropriate agency.

(e) Assessment of civil money penalties by the OCC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464 (d), (s) and (v);

(2) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d);

(3) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a (i) and (r);

(4) Any provisions of the Change in Bank Control Act, any regulation or order issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(5) Sections 22(h) and 23 of the Federal Reserve Act, or any regulation issued thereunder or certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1468;

(6) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(7) Section 1120 of Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder;

(8) The terms of any final or temporary order issued or enforceable pursuant to section 8 of the FDIA or of any written agreement executed by the OCC, the terms of any conditions imposed in writing by the OCC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(9) Any provision of law referenced in section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder; and

(10) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(f) Remedial action under section 102 of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties on senior examiners for violation of post-employment prohibitions; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 109.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 109.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the OCC's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the OCC or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Comptroller* means the Comptroller of the Currency or his or her designee.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the OCC in an adjudicatory proceeding.

(f) *Final order* means an order issued by the OCC with or without the consent of the affected institution or the institution-affiliated party that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes any Federal savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)).

(h) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(i) *Local Rules* means those rules found in subpart B of this part.

(j) *OCC* means the Office of the Comptroller of the Currency.

(k) *Office of Financial Institution Adjudication* (OFIA) means the executive body charged with overseeing the administration of administrative enforcement proceedings for the OCC, the Board of Governors of the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

(l) *Party* means the OCC and any person named as a party in any notice.

(m) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (g) of this section.

(n) *Respondent* means any party other than the OCC.

(o) *Uniform Rules* means those rules in subpart A of this part.

(p) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 109.4 Authority of the Comptroller.

The Comptroller may, at any time during the pendency of a proceeding perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 109.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 109.31 of this subpart;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Comptroller shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Comptroller a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 109.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the OCC or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the OCC if such attorney is not currently suspended or debarred from practice before the OCC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the OCC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Comptroller, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 109.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 109.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 109.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 109.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the OCC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Comptroller, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Comptroller until the date that the Comptroller issues the final decision pursuant to § 109.40(c) of this subpart:

(1) No interested person outside the OCC shall make or knowingly cause to be made an *ex parte* communication to the Comptroller, the administrative law judge, or a decisional employee; and

(2) The Comptroller, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the OCC any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, the Comptroller or other person identified

in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Comptroller or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation-of-functions.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the OCC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 109.40 of this subpart, except as witness or counsel in public proceedings.

§ 109.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 109.25 and 109.26 of this subpart, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Comptroller or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Comptroller or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section as to form.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8 1–2 × 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 109.7 of this subpart.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the OCC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Comptroller, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 109.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 109.10(c) of this subpart as to form.

(c) *By the Comptroller or the administrative law judge.* (1) All papers required to be served by the Comptroller or the administrative law judge upon a party who has appeared in the proceeding through a counsel of record, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 109.6 of this subpart, the Comptroller or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 109.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of

time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Comptroller or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Comptroller or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 109.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or any notice or order issued in the proceedings. After the referral of the case to the Comptroller pursuant to § 109.38 of this subpart, the Comptroller may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or on the Comptroller's or the administrative law judge's own motion after notice and opportunity to respond is afforded all non-moving parties.

§ 109.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or deposition shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the OCC is the party requesting the subpoena. The OCC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the OCC.

§ 109.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any OCC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 109.16 OCC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the OCC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the OCC to conduct or continue any form of investigation authorized by law.

§ 109.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 109.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the Comptroller.

(ii) The notice must be served by the Comptroller upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Comptroller.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the OCC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the OCC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) The answer and/or request for a hearing shall be filed with OFIA.

§ 109.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the

proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Comptroller based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 109.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Comptroller or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 109.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Comptroller a recommended decision containing the findings and the relief sought in the notice.

§ 109.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 109.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, but upon the filing of the recommended decision, motions must be filed with the Comptroller.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Comptroller, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 109.29 and 109.30 of this subpart.

§ 109.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term ''documents'' may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by § 109.102 of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable

limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 109.25 of this subpart.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 109.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed under 12 CFR 4.17 for requests under the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 109.23 of this subpart to revoke or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 109.23 of this subpart are waived.

(2) The party who served the request that is the subject of a motion to revoke or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 109.23 of this subpart for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 109.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 109.24(d) of this subpart. The party obtaining the document subpoena is responsible for

serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 109.25(d) of this subpart, and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 109.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with or procures a failure to comply with, a subpoena issued under this section.

§ 109.28 Interlocutory review.

(a) *General rule.* The Comptroller may review a ruling of the administrative law judge prior to the certification of the record to the Comptroller only in accordance with the procedures set forth in this section and § 109.23 of this subpart.

(b) *Scope of review.* The Comptroller may exercise interlocutory review of a ruling of the administrative law judge if the Comptroller finds that:

(1) The ruling involves a controlling question of law or policy as to which

substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 109.23 of this subpart. Any party may file a response to a request for interlocutory review in accordance with § 109.23(d) of this subpart. Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Comptroller for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Comptroller under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Comptroller.

§ 109.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Comptroller issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Comptroller. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 109.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 109.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a ''scheduling conference.'' The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at its expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 109.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 109.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Comptroller, in the Comptroller's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Comptroller a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Comptroller. The form of, and procedure for, these requests and replies are governed by § 109.23 of this subpart. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 109.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena duces tecum requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 109.26(c) of this subpart.

§ 109.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

§ 109.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the APA and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Comptroller shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by the appropriate Federal banking agency, as defined in section 3(q) of the FDIA (12 U.S.C. 1813(q)), or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Comptroller.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 109.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 109.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 109.37(b) of this subpart, the administrative law judge shall file with and certify to the Comptroller, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Comptroller for final determination the record of the proceeding, the administrative law judge shall furnish to the Comptroller a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 109.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 109.38 of this subpart, a party may file with the Comptroller written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Comptroller if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 109.40 Review by the Comptroller.

(a) *Notice of submission to the Comptroller.* When the Comptroller determines that the record in the proceeding is complete, the Comptroller shall serve notice upon the parties that the proceeding has been submitted to the Comptroller for final decision.

(b) *Oral argument before the Comptroller.* Upon the initiative of the Comptroller or on the written request of any party filed with the Comptroller within the time for filing exceptions, the Comptroller may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Comptroller's final decision. Oral argument before the Comptroller must be on the record.

(c) *Comptroller's final decision.* (1) Decisional employees may advise and assist the Comptroller in the consideration and disposition of the case. The final decision of the Comptroller will be based upon review of the entire record of the proceeding, except that the Comptroller may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Comptroller shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Comptroller orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Comptroller shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Comptroller or required by statute, upon any appropriate state or Federal supervisory authority.

§ 109.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the OCC may not, unless specifically ordered by the Comptroller or a reviewing court, operate as a stay of any order issued by the Comptroller. The Comptroller may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of the order.

Subpart B—Local Rules

§ 109.100 Scope.

The rules and procedures in this subpart B shall apply to those proceedings covered by subpart A of this part. In addition, subpart A of this part and this subpart shall apply to adjudicatory proceedings for which hearings on the record are provided for by the following statutory provisions:

(a) Proceedings under section 10(a)(2)(D) of the HOLA (12 U.S.C. 1467a(a)(2)(D)) to determine whether any person directly or indirectly exercises a controlling influence over the management or policies of a savings association or any other company; and

(b) [Reserved]

(c) Proceedings under section 15(c)(4) of the Securities and Exchange Act of 1934 (15 U.S.C. 78o(c)(4)) (Exchange Act) to determine whether any Federal savings association or person subject to the jurisdiction of the OCC pursuant to section 12(i) of the Exchange Act (15 U.S.C. 78 *l* (i)) has failed to comply with the provisions of sections 12, 13, 14(a), 14(c), 14(d) or 14(f) of the Exchange Act.

§ 109.101 Appointment of Office of Financial Institution Adjudication.

Unless otherwise directed by the OCC, all hearings under subpart A of this part and this subpart shall be conducted by administrative law judges under the direction of the Office of Financial Institution Adjudication.

§ 109.102 Discovery.

(a) *In general.* A party may take the deposition of an expert, or of a person, including another party, who has direct knowledge of matters that are non-privileged, relevant and material to the proceeding and where there is a need for the deposition. The deposition of experts shall be limited to those experts who are expected to testify at the hearing.

(b) *Notice.* A party desiring to take a deposition shall give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time and place for taking the deposition and the name and address of the person to be deposed.

(c) *Time limits.* A party may take depositions at any time after the commencement of the proceeding, but no later than ten days before the scheduled hearing date, except with permission of the administrative law judge for good cause shown.

(d) *Conduct of the deposition.* The witness must be duly sworn, and each party shall have the right to examine the witness with respect to all non-privileged, relevant and material matters of which the witness has factual, direct and personal knowledge.

Objections to questions or exhibits shall be in short form, stating the grounds for objection. Failure to object to questions or exhibits is not a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The court reporter shall transcribe or otherwise record the witness's testimony, as agreed among the parties.

(e) *Protective orders.* At any time after notice of a deposition has been given, a party may file a motion for the issuance of a protective order. Such protective order may prohibit, terminate, or limit the scope or manner of the taking of a deposition. The administrative law judge shall grant such protective order upon a showing of sufficient grounds, including that the deposition:

(1) Is unreasonable, oppressive, excessive in scope, or unduly burdensome;

(2) Involves privileged, investigative, trial preparation, irrelevant or immaterial matters; or

(3) Is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent.

(f) *Fees.* Deposition witnesses, including expert witnesses, shall be paid the same expenses in the same manner as are paid witnesses in the district courts of the United States in proceedings in which the United States Government is a party. Expenses in accordance with this paragraph shall be paid by the party seeking to take the deposition.

(g) *Deposition subpoenas*—(1) *Issuance.* At the request of a party, the administrative law judge shall issue a subpoena requiring the attendance of a witness at a deposition. The attendance of a witness may be required from any

place in any state or territory that is subject to the jurisdiction of the United States or as otherwise permitted by law.

(2) *Service.* The party requesting the subpoena must serve it on the person named therein or upon that person's counsel, by any of the methods identified in § 109.11(d) of this part. The party serving the subpoena must file proof of service with the administrative law judge.

(3) *Motion to quash.* A person named in the subpoena or a party may file a motion to quash or modify the subpoena. A statement of the reasons for the motion must accompany it and a copy of the motion must be served on the party that requested the subpoena. The motion must be made prior to the time for compliance specified in the subpoena and not more than ten days after the date of service of the subpoena, or if the subpoena is served within 15 days of the hearing, within five days after the date of service.

(4) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures of § 109.27(d) of this part.

§ 109.103 Civil money penalties.

(a) *Assessment.* In the event of consent, or if upon the record developed at the hearing the OCC finds that any of the grounds specified in the notice issued pursuant to § 109.18 of this part have been established, the OCC may serve an order of assessment of civil money penalty upon the party concerned. The assessment order shall be effective immediately upon service or upon such other date as may be specified therein and shall remain effective and enforceable until it is stayed, modified, terminated, or set aside by the OCC or by a reviewing court.

(b) *Payment.* (1) Civil penalties assessed pursuant to subpart A of this part and this subpart B are payable and to be collected within 60 days after the issuance of the notice of assessment, unless the OCC fixes a different time for payment where it determines that the purpose of the civil money penalty would be better served thereby; however, if a party has made a timely request for a hearing to challenge the assessment of the penalty, the party may not be required to pay such penalty until the OCC has issued a final order of assessment following the hearing. In such instances, the penalty shall be paid within 60 days of service of such order unless the OCC fixes a different time for payment. Notwithstanding the foregoing, the OCC may seek to attach the party's assets or to have a receiver appointed to secure payment of the potential civil money penalty or other obligation in advance of the hearing in accordance with section 8(i)(4) of the FDIA (12 U.S.C. 1818(i)(4)).

(2) Checks in payment of civil penalties shall be made payable to the Treasurer of the United States and sent to the OCC. Upon receipt, the OCC shall forward the check to the Treasury of the United States.

(c) *Maximum amount of civil money penalties*—(1) *Statutory formula.* The OCC is required by statute to annually adjust for inflation the maximum amount of each civil money penalty within its jurisdiction to administer. The inflation adjustment is calculated by multiplying the maximum dollar amount of the civil money penalty for the previous calendar year by the cost-of-living inflation adjustment multiplier provided annually by the Office of Management and Budget and rounding the total to the nearest dollar.

(2) *Notice of inflation adjustments.* The OCC will publish notice in the **Federal Register** of the maximum penalties which may be assessed on an annual basis on, or before, January 15 of each calendar year based on the formula in paragraph (a) of this section, for penalties assessed on, or after, the date of publication of the most recent notice related to conduct occurring on or after November 2, 2015.

§ 109.104 Additional procedures.

(a) *Replies to exceptions.* Replies to written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order pursuant to § 109.39 of this part shall be filed within 10-days of the date such written exceptions were required to be filed.

(b) *Motions.* All motions shall be filed with the administrative law judge and an additional copy shall be filed with the OCC Hearing Clerk who receives adjudicatory filings; provided, however, that once the administrative law judge has certified the record to the Comptroller pursuant to § 109.38 of this part, all motions must be filed with the Comptroller to the attention of the Hearing Clerk within the 10-day period following the filing of exceptions allowed for the filing of replies to exceptions. Responses to such motions filed in a timely manner with the Comptroller, other than motions for oral argument before the Comptroller, shall be allowed pursuant to the procedures at § 109.23(d) of this part. No response is required for the Comptroller to make a determination on a motion for oral argument.

(c) *Authority of administrative law judge.* In addition to the powers listed in § 109.5 of this part, the administrative law judge shall have the authority to deny any dispositive motion and shall follow the procedures set forth for motions for summary disposition at § 109.29 of this part and partial summary disposition at § 109.30 of this part in making determinations on such motions.

(d) *Notification of submission of proceeding to the Comptroller.* Upon the expiration of the time for filing any exceptions, any replies to such exceptions or any motions and any ruling thereon, and after receipt of certified record, the OCC shall notify the parties within ten days of the submission of the proceeding to the Comptroller for final determination.

(e) *Extensions of time for final determination.* The Comptroller may, *sua sponte,* extend the time for final determination by signing an order of extension of time within the 90-day time period and notifying the parties of such extension thereafter.

(f) *Service upon the OCC.* Service of any document upon the OCC shall be made by filing with the Hearing Clerk, in addition to the individuals and/or offices designated by the OCC in its Notice issued pursuant to § 109.18 of this part, or such other means reasonably suited to provide notice of the person and/or offices designated to receive filings.

(g) *Filings with the Comptroller.* An additional copy of all materials required or permitted to be filed with or referred to the administrative law judge pursuant to subpart A and B of this part shall be filed with the Hearing Clerk. This rule shall not apply to the transcript of testimony and exhibits adduced at the hearing or to proposed exhibits submitted in advance of the hearing pursuant to an order of the administrative law judge under § 109.32 of this part. Materials required or permitted to be filed with or referred to the Comptroller pursuant to subparts A and B of this part shall be filed with the Comptroller, to the attention of the Hearing Clerk.

(h) *Presence of cameras and other recording devices.* The use of cameras and other recording devices, other than those used by the court reporter, shall be prohibited and excluded from the proceedings.

PART 112—RULES FOR INVESTIGATIVE PROCEEDINGS AND FORMAL EXAMINATION PROCEEDINGS

Authority: 12 U.S.C. 1462a, 1463, 1464, 1467, 1467a, 1813, 1817(j), 1818(n), 1820(c), 5412(b)(2)(B); 15 U.S.C. 78*l.*

§ 112.1 Scope of part.

This part prescribes rules of practice and procedure applicable to the conduct of formal examination proceedings with respect to Federal savings associations and their affiliates under section 5(d)(1)(B) of the HOLA, as amended, 12 U.S.C. 1464(d)(1)(B) or section 7(j)(15) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1817(j)(15) (''FDIA''), section 8(n) of the FDIA, 12 U.S.C. 1818(n), or section 10(c) of the FDIA, 12 U.S.C. 1820(c). This part does not apply to adjudicatory proceedings as to which hearings are required by statute, the rules for which are contained in part 109 of this chapter.

§ 112.2 Definitions.

As used in this part:

(a) *OCC* means the Office of the Comptroller of the Currency;

(b) [Reserved]

(c) *Formal examination proceeding* means the administration of oaths and affirmations, taking and preserving of testimony, requiring the production of books, papers, correspondence, memoranda, and all other records, the issuance of subpoenas, and all related activities in connection with examination of savings associations and their affiliates conducted pursuant to section 5(d)(1)(B) of the HOLA, section 7(j)(15) of the FDIA, section 8(n) of the FDIA or section 10(c) of the FDIA; and

(d) *Designated representative* means the person or persons empowered by the OCC to conduct an investigative proceeding or a formal examination proceeding.

§ 112.3 Confidentiality of proceedings.

All formal examination proceedings shall be private and, unless otherwise ordered by the OCC, all investigative proceedings shall also be private. Unless otherwise ordered or permitted by the OCC, or required by law, and except as provided in §§ 112.4 and 112.5, the entire record of any investigative proceeding or formal examination proceeding, including the resolution of the OCC or its delegate(s) authorizing the proceeding, the transcript of such proceeding, and all documents and information obtained by the designated representative(s) during the course of said proceedings shall be confidential.

§ 112.4 Transcripts.

Transcripts or other recordings, if any, of investigative proceedings or formal examination proceedings shall be prepared solely by an official reporter or by any other person or means authorized by the designated representative. A person who has submitted documentary evidence or given testimony in an investigative proceeding or formal examination proceeding may procure a copy of his own documentary evidence or transcript of his own testimony upon payment of the cost thereof; *provided,* that a person seeking a transcript of his own testimony must file a written request with the OCC's Director for Enforcement stating the reason he desires to procure such transcript, and said persons may for good cause deny such request. In any event, any witness (or his counsel) shall have the right to inspect the transcript of the witness' own testimony.

§ 112.5 Rights of witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or give testimony at an investigative proceeding or formal examination proceeding shall have the right to examine, upon request, the OCC resolution authorizing such proceeding. Copies of such resolution shall be furnished, for their retention, to such persons only with the written approval of the OCC.

(b) Any witness at an investigative proceeding or formal examination proceeding may be accompanied and advised by an attorney personally representing that witness.

(1) Such attorney shall be a member in good standing of the bar of the highest court of any state, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or debarred from practice by the bar of any such political entity or before the OCC in accordance with the provisions of part 19 of this chapter and has not been excluded from the particular investigative proceeding or formal examination proceeding in accordance with paragraph (b)(3) of this section.

(2) Such attorney may advise the witness before, during, and after the taking of his testimony and may briefly question the witness, on the record, at the conclusion of his testimony, for the sole purpose of clarifying any of the answers the witness has given. During the taking of the testimony of a witness, such attorney may make summary notes solely for his use in representing his client. All witnesses shall be sequestered, and, unless permitted in the discretion of the designated representative, no witness or accompanying attorney may be permitted to be present during the taking of testimony of any other witness called in such proceeding. Neither attorney(s) for the association(s) that are the subjects of the investigative proceedings or formal examination proceedings, nor attorneys for any other interested persons, shall have any right to be present during the testimony of any witness not personally being represented by such attorney.

(3) The OCC, for good cause, may exclude a particular attorney from further participation in any investigation in which the OCC has found the attorney to have engaged in dilatory, obstructionist, egregious, contemptuous or contumacious conduct. The person conducting an investigation may report to the OCC instances of apparently dilatory, obstructionist, egregious, contemptuous or contumacious conduct on the part of an attorney. After due notice to the attorney, the OCC may take such action as the circumstances warrant based upon a written record evidencing the conduct of the attorney in that investigation or such other or additional written or oral presentation as the OCC may permit or direct.

§ 112.6 Obstruction of the proceedings.

The designated representative shall report to the Comptroller any instances where any witness or counsel has engaged in dilatory, obstructionist, or contumacious conduct or has otherwise violated any provision of this part during the course of an investigative proceeding or formal examination proceeding; and the OCC may take such action as the circumstances warrant, including the exclusion of counsel from further participation in such proceeding.

§ 112.7 Subpoenas.

(a) *Service.* Service of a subpoena in connection with any investigative proceeding or formal examination proceeding shall be effected in the following manner:

(1) *Service upon a natural person.* Service of a subpoena upon a natural person may be effected by handing it to such person; by leaving it at his office with the person in charge thereof, or, if there is no one in charge, by leaving it in a conspicuous place therein; by leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; by mailing it to him by registered or certified mail or by an express delivery service at his last

known address; or by any method whereby actual notice is given to him.

(2) *Service upon other persons.* When the person to be served is not a natural person, service of the subpoena may be effected by handing the subpoena to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; by mailing it to any such representative by registered or certified mail or by an express delivery service at his last known address; or by any method whereby actual notice is given to such person.

(b) *Motions to quash.* Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the Deputy Chief Counsel or his designee to quash or modify such subpoena, accompanying such application with a statement of the reasons therefor. The Deputy Chief Counsel or his designee, as appropriate, may:

(1) Deny the application;

(2) Quash or revoke the subpoena;

(3) Modify the subpoena; or

(4) Condition the granting of the application on such terms as the Deputy Chief Counsel or his designee determines to be just, reasonable, and proper.

(c) *Attendance of witnesses.* Subpoenas issued in connection with an investigative proceeding or formal examination proceeding may require the attendance and/or testimony of witnesses from any state or territory of the United States and the production by such witnesses of documentary or other tangible evidence at any designated place where the proceeding is being (or is to be) conducted. Foreign nationals are subject to such subpoenas if such service is made upon a duly authorized agent located in the United States.

(d) *Witness fees and mileage.* Witnesses summoned in any proceeding under this part shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Such fees and mileage need not be tendered when the subpoena is issued on behalf of the OCC by any of its designated representatives.

PART 165—PROMPT CORRECTIVE ACTION

Authority: 12 U.S.C. 1831o, 5412(b)(2)(B).

§§ 165.1–165.7 [Reserved]

§ 165.8 Procedures for reclassifying a Federal savings association based on criteria other than capital.

(a) *Reclassification based on unsafe or unsound condition or practice*—(1) *Issuance of notice of proposed reclassification—(i) Grounds for reclassification.* (A) Pursuant to 12 CFR 6.4(d), the OCC may reclassify a well capitalized Federal savings association as adequately capitalized or subject an adequately capitalized or undercapitalized institution to the supervisory actions applicable to the next lower capital category if:

(*1*) The OCC determines that the savings association is in an unsafe or unsound condition; or

(*2*) The OCC deems the savings association to be engaged in an unsafe or unsound practice and not to have corrected the deficiency.

(B) Any action pursuant to this paragraph (a)(1)(i) shall hereinafter be referred to as ''reclassification.''

(ii) *Prior notice to institution.* Prior to taking action pursuant to 12 CFR 6.4(d), the OCC shall issue and serve on the Federal savings association a written notice of the OCC's intention to reclassify the savings association.

(2) *Contents of notice.* A notice of intention to reclassify a Federal savings association based on unsafe or unsound condition shall include:

(i) A statement of the savings association's capital measures and capital levels and the category to which the savings association would be reclassified;

(ii) The reasons for reclassification of the savings association;

(iii) The date by which the savings association subject to the notice of reclassification may file with the OCC a written appeal of the proposed reclassification and a request for a hearing, which shall be at least 14 calendar days from the date of service of the notice unless the OCC determines that a shorter period is appropriate in light of the financial condition of the savings association or other relevant circumstances.

(3) *Response to notice of proposed reclassification.* A Federal savings association may file a written response to a notice of proposed reclassification within the time period set by the OCC. The response should include:

(i) An explanation of why the savings association is not in unsafe or unsound condition or otherwise should not be reclassified; and

(ii) Any other relevant information, mitigating circumstances, documentation, or other evidence in support of the position of the savings association or company regarding the reclassification.

(4) *Failure to file response.* Failure by a Federal savings association to file, within the specified time period, a written response with the OCC to a notice of proposed reclassification shall constitute a waiver of the opportunity to respond and shall constitute consent to the reclassification.

(5) *Request for hearing and presentation of oral testimony or witnesses.* The response may include a request for an informal hearing before the OCC or its designee under this section. If the Federal savings association desires to present oral testimony or witnesses at the hearing, the savings association shall include a request to do so with the request for an informal hearing. A request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing, and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right to present oral testimony or witnesses.

(6) *Order for informal hearing.* Upon receipt of a timely written request that includes a request for a hearing, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the OCC allows further time at the request of the Federal savings association. The hearing shall be held in Washington, DC or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(7) *Hearing procedures.* (i) The Federal savings association shall have the right to introduce relevant written materials and to present oral argument at the hearing. The savings association may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act (5 U.S.C. 554–557) governing adjudications required by statute to be determined on the record nor parts 19 or 109 of this chapter apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(ii) The informal hearing shall be recorded and a transcript furnished to the savings association upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(iii) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow

additional written submissions to the hearing record.

(8) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC on the reclassification.

(9) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing was requested, the OCC will decide whether to reclassify the Federal savings association and notify the savings association of the OCC's decision.

(b) *Request for rescission of reclassification.* Any Federal savings association that has been reclassified under this section, may, upon a change in circumstances, request in writing that the OCC reconsider the reclassification, and may propose that the reclassification be rescinded and that any directives issued in connection with the reclassification be modified, rescinded, or removed. Unless otherwise ordered by the OCC, the savings association shall remain subject to the reclassification and to any directives issued in connection with that reclassification while such request is pending before the OCC.

§ 165.9 Order to dismiss a director or senior executive officer.

(a) *Service of notice.* When the OCC issues and serves a directive on a Federal savings association pursuant to subpart B of part 6 of this chapter requiring the savings association to dismiss any director or senior executive officer under section 38(f)(2)(F)(ii) of the FDI Act, the OCC shall also serve a copy of the directive, or the relevant portions of the directive where appropriate, upon the person to be dismissed.

(b) *Response to directive*—(1) *Request for reinstatement.* A director or senior executive officer who has been served with a directive under paragraph (a) of this section (Respondent) may file a written request for reinstatement. The request for reinstatement shall be filed within 10 calendar days of the receipt of the directive by the Respondent, unless further time is allowed by the OCC at the request of the Respondent.

(2) *Contents of request; informal hearing.* The request for reinstatement should include reasons why the Respondent should be reinstated, and may include a request for an informal hearing before the OCC or its designee under this section. If the Respondent desires to present oral testimony or witnesses at the hearing, the Respondent shall include a request to do so with the request for an informal hearing. The request to present oral testimony or witnesses shall specify the names of the witnesses and the general nature of their expected testimony. Failure to request a hearing shall constitute a waiver of any right to a hearing and failure to request the opportunity to present oral testimony or witnesses shall constitute a waiver of any right or opportunity to present oral testimony or witnesses.

(3) *Effective date.* Unless otherwise ordered by the OCC, the dismissal shall remain in effect while a request for reinstatement is pending.

(c) *Order for informal hearing.* Upon receipt of a timely written request from a Respondent for an informal hearing on the portion of a directive requiring a Federal savings association to dismiss from office any director or senior executive officer, the OCC shall issue an order directing an informal hearing to commence no later than 30 days after receipt of the request, unless the Respondent requests a later date. The hearing shall be held in Washington, DC, or at such other place as may be designated by the OCC, before a presiding officer(s) designated by the OCC to conduct the hearing.

(d) *Hearing procedures.* (1) A Respondent may appear at the hearing personally or through counsel. A Respondent shall have the right to introduce relevant written materials and to present oral argument. A Respondent may introduce oral testimony and present witnesses only if expressly authorized by the OCC or the presiding officer(s). Neither the provisions of the Administrative Procedure Act governing adjudications required by statute to be determined on the record nor parts 19 or 109 of this chapter apply to an informal hearing under this section unless the OCC orders that such procedures shall apply.

(2) The informal hearing shall be recorded and a transcript furnished to the Respondent upon request and payment of the cost thereof. Witnesses need not be sworn, unless specifically requested by a party or the presiding officer(s). The presiding officer(s) may ask questions of any witness.

(3) The presiding officer(s) may order that the hearing be continued for a reasonable period (normally five business days) following completion of oral testimony or argument to allow additional written submissions to the hearing record.

(e) *Standard for review.* A Respondent shall bear the burden of demonstrating that his or her continued employment by or service with the Federal savings association would materially strengthen the savings association's ability:

(1) To become adequately capitalized, to the extent that the directive was issued as a result of the savings association's capital level or failure to submit or implement a capital restoration plan; and

(2) To correct the unsafe or unsound condition or unsafe or unsound practice, to the extent that the directive was issued as a result of classification of the savings association based on supervisory criteria other than capital, pursuant to section 38(g) of the FDI Act.

(f) *Recommendation of presiding officers.* Within 20 calendar days following the date the hearing and the record on the proceeding are closed, the presiding officer(s) shall make a recommendation to the OCC concerning the Respondent's request for reinstatement with the Federal savings association.

(g) *Time for decision.* Not later than 60 calendar days after the date the record is closed or the date of the response in a case where no hearing has been requested, the OCC shall grant or deny the request for reinstatement and notify the Respondent of the OCC's decision. If the OCC denies the request for reinstatement, the OCC shall set forth in the notification the reasons for the OCC's action.

§ 165.10 [Reserved]

PART 108—[REMOVED]

■ 11. Part 108 is removed.

PART 109—[REMOVED]

■ 12. Part 109 is removed.

PART 112—[REMOVED]

■ 13. Part 112 is removed.

PART 150—FIDUCIARY POWERS OF FEDERAL SAVINGS ASSOCIATIONS

■ 14. The authority citation for part 150 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 5412(b)(2)(B).

§ 150.570 [Amended]

■ 15. Section 150.570 is amended by removing the words ''part 109'' and adding in their place the words ''part 19''.

PART 165—[REMOVED]

■ 16. Part 165 is removed.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

For the reasons stated in the joint preamble, the Board amends parts 238 and 263 in title 12 of the Code of Federal Regulations as follows:

PART 238—SAVINGS AND LOAN HOLDING COMPANIES

■ 17. The authority citation for part 238 continues to read as follows:

Authority: 5 U.S.C. 552, 559; 12 U.S.C. 1462, 1462a, 1463, 1464, 1467, 1467a, 1468, 5365; 1813, 1817, 1829e, 1831i, 1972, 15 U.S.C. 78*l*.

Subpart L—[Removed and Reserved]

■ 18. Remove and reserve subpart L, consisting of §§ 238.111 through 238.117.

PART 263—RULES OF PRACTICE FOR HEARINGS

■ 19. The authority citation for part 263 is revised to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 248, 324, 334, 347a, 504, 505, 1464, 1467, 1467a, 1817(j), 1818, 1820(k), 1829, 1831o, 1831p–1, 1832(c), 1847(b), 1847(d), 1884, 1972(2)(F), 3105, 3108, 3110, 3349, 3907, 3909(d), 4717, 5323, 5362, 5365, 5463, 5464, 5466, 5467; 15 U.S.C. 21, 78l(i), 78o–4, 78o–5, 78u–2; 1639e(K); 28 U.S.C. 2461 note; 31 U.S.C. 5321; and 42 U.S.C. 4012a.

■ 20. Subparts A and B are revised to read as follows:

PART 263—RULES OF PRACTICE FOR HEARINGS

Subpart A—Uniform Rules of Practice and Procedure

Sec.

Subpart B—Board Local Rules Supplementing the Uniform Rules

Subpart A—Uniform Rules of Practice and Procedure

§ 263.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (''FDIA'') (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Board of Governors of the Federal Reserve System (''Board'') should issue an order to approve or disapprove a person's proposed acquisition of a state member bank, bank holding company, or savings and loan holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the Board is the appropriate agency;

(e) Assessment of civil money penalties by the Board against institutions, institution-affiliated parties, and certain other persons for which the Board is the appropriate agency for any violation of:

(1) Any provision of the Bank Holding Company Act of 1956, as amended (''BHC Act''), or any order or regulation issued thereunder, pursuant to 12 U.S.C. 1847(b) and (d);

(2) Sections 19, 22, 23, 23A and 23B of the Federal Reserve Act (''FRA''), or any regulation or order issued thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 9 of the FRA pursuant to 12 U.S.C. 324;

(4) Section 106(b) of the Bank Holding Company Act Amendments of 1970 and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

(5) Any provision of the Change in Bank Control Act of 1978, as amended, or any regulation or order issued thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(6) Any provision of the International Lending Supervision Act of 1983 (''ILSA'') or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(7) Any provision of the International Banking Act of 1978 (''IBA'') or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder;

(10) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the Board or the former Office of Thrift Supervision (''OTS''), the terms of any condition imposed in writing by the Board or the former OTS in connection with the grant of an application or request, and certain unsafe or unsound practices or breaches of fiduciary duty or law or regulation pursuant to 12 U.S.C. 1818(i)(2);

(11) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(12) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(13) Section 5 of the Home Owners' Loan Act (''HOLA'') or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d), (s) and (v);

(14) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d); and

(15) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a(i) and (r);

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) for violations of the post-employment restrictions imposed by that section; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules (see § 263.3(i)).

§ 263.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 263.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge* (ALJ) means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the Board's or ALJ's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Agency or the ALJ, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Electronic signature* means electronically affixing the equivalent of a signature to an electronic document filed or transmitted electronically.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the Board in an adjudicatory proceeding.

(f) *Final order* means an order issued by the Board with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes:

(1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHC Act (12 U.S.C. 1841 *et seq.*);

(3) Any organization organized and operated under section 25A of the FRA (12 U.S.C. 611 *et seq.*) or operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(4) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof;

(5) Any branch or agency as those terms are defined in section 1(b) of the IBA (12 U.S.C. 3101(1), (3), (5), (6));

(6) Any savings and loan holding company or any subsidiary (other than a depository institution) of a savings and loan holding company as those terms are defined in the HOLA (12 U.S.C. 1461 *et seq.*);

(7) Any U.S. or foreign nonbank financial company that the Financial Stability Oversight Council (''FSOC'') requires the Board to supervise under section 113 of the Dodd-Frank Act (12 U.S.C. 5323(a)(1), (b)(1)), or any subsidiary (other than a bank) thereof;

(8) Any financial market utility or financial institution conducting payment, clearing, or settlement activities that FSOC designates as systematically important under section 804 of the Dodd-Frank Act (12 U.S.C. 5463); and

(9) Any other entity subject to the supervision of the Board.

(h) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(i) *Local Rules* means those rules promulgated by the Board in this part other than this subpart.

(j) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the Board, the Office of Comptroller of the Currency (''OCC''), the Federal Deposit Insurance Corporation (''FDIC''), and the National Credit Union Administration (''NCUA'').

(k) *Party* means the Board and any person named as a party in any notice.

(l) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in paragraph (g) of this section.

(m) *Respondent* means any party other than the Board.

(n) *Uniform Rules* means those rules in this subpart A that are common to the Board, the OCC, the FDIC, and the NCUA.

(o) *Violation* means any violation as that term is defined in section 3(v) of the FDIA (12 U.S.C. 1813(v)).

§ 263.4 Authority of the Board.

The Board may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the ALJ.

§ 263.5 Authority of the administrative law judge (''ALJ'').

(a) *General rule.* All proceedings governed by this part must be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The ALJ has all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The ALJ has all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* protective orders, and other orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 263.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board has the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board a recommended decision as provided in this section;

(9) To recuse oneself by motion made by a party or on the ALJ's own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of an ALJ.

§ 263.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the Board or an ALJ*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the Board if such attorney is not currently suspended or debarred from practice before the Board.

(2) *By non-attorneys.* An individual may appear on the individual's own behalf.

(3) *Notice of appearance.* (i) Any individual acting on the individual's own behalf or as counsel on behalf of a party, including the Board, must file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include:

(A) A written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (2) of this section and is authorized to represent the particular party; and

(B) A written acknowledgement that the individual has reviewed and will comply with the Uniform Rules and Local Rules in subpart B of this part.

(ii) By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that the counsel is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, the counsel will, if required by the ALJ, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous, or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 263.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice must be signed by at least one counsel of record in the counsel's individual name and must state that counsel's mailing address, electronic mail address, and telephone number. A party who acts as the party's own counsel must sign that person's individual name and state that person's mailing address, electronic mail address, and telephone number on every filing or submission of record. Electronic signatures may be used to satisfy the signature requirements of this section.

(b) *Effect of signature.* (1) The signature of counsel or a party will constitute a certification: the counsel or party has read the filing or submission of record; to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the ALJ will strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the counsel's or party's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 263.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person may appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The ALJ may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 263.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 263.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication. Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the Board (including such person's counsel); and

(ii) The ALJ handling that proceeding, a member of the Board, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Board until the date that the Board issues a final decision pursuant to § 263.40(c):

(1) An interested person outside the Federal Reserve System must not make or knowingly cause to be made an *ex parte* communication to a member of the Board, the ALJ, or a decisional employee; and

(2) A member of the Board, ALJ, or decisional employee may not make or knowingly cause to be made to any interested person outside the Federal Reserve System any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by the ALJ, a member of the Board, or any other person identified in paragraph (a) of this section, that person will cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding may, within ten days of service of the *ex parte* communication, file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The ALJ or the Board then determines

whether any action should be taken concerning the *ex parte* communication in accordance with paragraph (d) of this section.

(d) *Sanctions.* Any party or counsel to a party who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board or the ALJ including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions*—(1) *In general.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the ALJ may not:

(i) Consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or

(ii) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Board.

(2) *Decision process.* An employee or agent engaged in the performance of investigative or prosecuting functions for the Board in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 263.40, except as witness or counsel in administrative or judicial proceedings.

§ 263.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 263.25 and 263.26, must be filed with OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board or the ALJ, filing may be accomplished by:

(1) Electronic mail or other electronic means designated by the Board or the ALJ;

(2) Personal service;

(3) Delivering the papers to a same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, mailing address, electronic mail address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on an 8 1/2×11 inch page and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 263.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the Board and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

§ 263.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers must serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party must use one of the following methods of service:

(1) Electronic mail or other electronic means;

(2) Personal service;

(3) Delivering the papers by same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *By the Board or the ALJ.* (1) All papers required to be served by the Board or the ALJ upon a party who has appeared in the proceeding in accordance with § 263.6 will be served by electronic mail or other electronic means designated by the Board or ALJ.

(2) If a respondent has not appeared in the proceeding in accordance with § 263.6, the Board or the ALJ will serve the respondent by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the respondent;

(iv) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the respondent's last known mailing address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the person's last known mailing address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved.

§ 263.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of transmission by electronic mail or other electronic means, upon transmittal by the serving party;

(ii) In the case of overnight delivery service or first class, registered, or

certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of personal service or same day courier delivery, upon actual service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board or ALJ in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by electronic mail or other electronic means or by same day courier delivery, add one calendar day to the prescribed period;

(2) If service is made by overnight delivery service, add two calendar days to the prescribed period; or

(3) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period.

§ 263.13 Change of time limits.

Except as otherwise provided by law, the ALJ may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board pursuant to § 263.38, the Board may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Board's or the ALJ's own motion.

§ 263.14 Witness fees and expenses.

(a) *In general.* A witness, including an expert witness, who testifies at a deposition or hearing will be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, except as provided in paragraph (b) and unless otherwise waived.

(b) *Exception for testimony by a party.* In the case of testimony by a party, no witness fees or mileage need to be paid. The Board will not be required to pay any fees to, or expenses of, any witness not subpoenaed by the Board.

(c) *Timing of payment.* Fees and mileage in accordance with this paragraph (c)must be paid in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the Board is the party requesting the subpoena.

§ 263.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. Any such offer or proposal may only be made to Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 263.16 The Board's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the Board to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the Board to conduct or continue any form of investigation authorized by law.

§ 263.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 263.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a proceeding governed by this subpart is commenced by issuance of a notice by the Board.

(ii) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law. Enforcement Counsel may serve the notice upon counsel for the respondent, provided that Enforcement Counsel has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent.

(iii) Enforcement Counsel must file the notice with OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Board.

(b) *Contents of notice.* Notice pleading applies. The notice must provide:

(1) The legal authority for the proceeding and for the Board's jurisdiction over the proceeding;

(2) Matters of fact or law showing that the Board is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing must be filed with OFIA.

§ 263.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent must file an answer as designated in the notice. In a civil money penalty proceeding, respondent must also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the respondent lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief, or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of the respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the Board a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board based upon a respondent's failure

to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order of the Board without further action by the ALJ.

§ 263.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board or ALJ orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the ALJ may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the ALJ that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The ALJ may grant a continuance to enable the objecting party to meet such evidence.

§ 263.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the ALJ will file with the Board a recommended decision containing the findings and the relief sought in the notice.

§ 263.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the ALJ's own motion, the ALJ may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence, or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The ALJ may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the ALJ finds:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 263.23 Motions.

(a) *In writing.* (1) Except as otherwise provided in this section, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the ALJ. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the ALJ directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the ALJ, except that following the filing of the recommended decision, motions must be filed with the Board.

(d) *Responses.* (1) Except as otherwise provided in this section, within ten days after service of any written motion, or within such other period of time as may be established by the ALJ or the Board, any party may file a written response to a motion. The ALJ will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 263.29 and 263.30.

§ 263.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b) through (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term *documents* includes writings, drawings, graphs, charts, photographs, recordings, electronically stored information, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party, into a reasonably usable form.

(2) Discovery by use of deposition is governed by § 263.53.

(3) Discovery by use of either interrogatories or requests for admission is not permitted.

(4) Any request to produce documents that calls for irrelevant material; or that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, or the time provided to respond in the request is inadequate.

(b) *Relevance.* A party may obtain document discovery regarding any non-privileged matter that has material relevance to the merits of the pending action.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit are permitted, unless the ALJ finds on the record that good cause exists for waiving the requirements of this paragraph (d).

§ 263.25 Request for document discovery from parties.

(a) *Document requests.* (1) Any party may serve on any other party a request to produce and permit the requesting party or its representative to inspect or copy any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. In the case of a request for inspection, the responding party may produce copies of documents or of electronically stored information instead of permitting inspection.

(2) The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected or produced; and

(ii) Must specify a reasonable time, place, and manner for the inspection or production.

(b) *Production or copying*—(1) *General.* Unless otherwise specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories of the request, and electronically stored information must be produced in a form in which it is ordinarily maintained or in a reasonably usable form.

(2) *Costs.* The producing party must pay its own costs to respond to a discovery request, unless otherwise agreed by the parties.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within 20 days of being served with such request, file a motion in accordance with the provisions of § 263.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to must be specified. Any objections not made in accordance with this paragraph and § 263.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within ten days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, or any other privileges of the Constitution, any applicable act of Congress, or the principles of common law, or are voluminous, these documents may be identified by category instead of by individual document. The ALJ retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 263.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the document request may file a written response to a motion to compel within ten days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the ALJ will rule promptly on all motions filed pursuant to this section. If the ALJ determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, the ALJ may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the ALJ. Notwithstanding any other provision in this part, the ALJ may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the ALJ its intention to file a timely motion for interlocutory review of the ALJ's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the ALJ issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena will not in any manner limit the sanctions that may be imposed by the ALJ against a party who fails to produce subpoenaed documents.

§ 263.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the ALJ for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party must specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party may apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 263.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The ALJ will promptly issue any document subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. The motion must be accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 263.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ, which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the ALJ has not quashed or modified. A party's right to seek court enforcement of a document subpoena will in no way limit the sanctions that may be imposed by the ALJ on a party who induces a failure to comply with subpoenas issued under this section.

§ 263.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the ALJ for the issuance of a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The ALJ may issue a deposition subpoena under this section upon showing:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time, manner, and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the ALJ requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the ALJ orders otherwise, no deposition under this section may be taken on fewer than ten days' notice to the witness and all parties.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the ALJ to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Each party must have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the ALJ for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition must certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section, or fails to comply with any order of the ALJ, which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the ALJ on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 263.28 Interlocutory review.

(a) *General rule.* The Board may review a ruling of the ALJ prior to the certification of the record to the Board only in accordance with the procedures set forth in this section and § 263.23.

(b) *Scope of review.* The Board may exercise interlocutory review of a ruling of the ALJ if the Board finds:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review must be filed by a party with the ALJ within ten days of the ruling and must otherwise comply with § 263.23. Any party may file a response to a request for interlocutory review in accordance with § 263.23(d). Upon the expiration of the time for filing all responses, the ALJ will refer the matter to the Board for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Board under this section suspends or stays the proceeding unless otherwise ordered by the ALJ or the Board.

§ 263.29 Summary disposition.

(a) *In general.* The ALJ will recommend that the Board issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes there is no genuine issue of material fact to be determined and that the party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the ALJ, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends supports the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the written request of any party or on the ALJ's own motion, the ALJ may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the ALJ will determine whether the moving party is entitled to summary disposition. If the ALJ determines that summary disposition is warranted, the ALJ will submit a recommended decision to that effect to the Board. If the ALJ finds that no party is entitled to summary disposition, the ALJ will make a ruling denying the motion.

§ 263.30 Partial summary disposition.

If the ALJ determines that a party is entitled to summary disposition as to certain claims only, the ALJ will defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the ALJ has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 263.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding, the ALJ will direct counsel for all parties to meet with the ALJ at a specified time and manner prior to the hearing for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a ''scheduling conference.'' The schedule for the identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits, and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The ALJ may, in addition to the scheduling conference, on the ALJ's own motion or at the request of any party, direct counsel for the parties to confer with the ALJ at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The ALJ may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at the party's expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the ALJ will serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 263.32 Prehearing submissions.

(a) *Party prehearing submissions.* Within the time set by the ALJ, but in no case later than 20 days before the start of the hearing, each party must file with the ALJ and serve on every other party:

(1) A prehearing statement that states:

(i) The party's position with respect to the legal issues presented;

(ii) The statutory and case law upon which the party relies; and

(iii) The facts that the party expects to prove at the hearing;

(2) A final list of witnesses to be called to testify at the hearing, including the name, mailing address, and electronic mail address of each witness and a short summary of the expected testimony of each witness, which need not identify the exhibits to be relied upon by each witness at the hearing;

(3) A list of the exhibits expected to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 263.33 Public hearings.

(a) *General rule.* All hearings must be open to the public, unless the Board, in the Board's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Board a request for a private hearing, and any party may file a reply to such a request. A party must serve on the ALJ a copy of any request or reply the party files with the Board. The form of, and procedure for, these requests and replies are governed by § 263.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in Enforcement Counsel's discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The ALJ will take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 263.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the ALJ may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production

of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application must serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the ALJ.

(3) The ALJ will promptly issue any hearing subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the ALJ, the party making the application must serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 263.26(c).

§ 263.35 Conduct of hearings.

(a) *General rules.* (1) *Conduct of hearings.* Hearings must be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel will present its case-in-chief first, unless otherwise ordered by the ALJ, or unless otherwise expressly specified by law or regulation. Enforcement Counsel will be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the ALJ will fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the ALJ may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the ALJ directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The ALJ may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the ALJ's own motion.

(c) *Electronic presentation.* Based on the circumstances of each hearing, the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If the ALJ requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs, unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

§ 263.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable, and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the ALJ or the Board must appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, must be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection, or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a State regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the ALJ's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what the examining counsel expected to prove by the expected testimony of the witness either by representation of counsel or by direct questioning of the witness.

(3) The ALJ will retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the ALJ may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 263.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the ALJ will serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the ALJ proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the ALJ or within such longer period as may be ordered by the ALJ.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the ALJ any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The ALJ will not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 263.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 263.37(b), the ALJ will file with and certify to the Board, for decision, the record of the proceeding. The record must include the ALJ's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The ALJ will serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the ALJ files with and certifies to the Board for final determination the record of the proceeding, the ALJ will furnish to the Board a certified index of the entire record of the proceeding. The certified index must include, at a minimum, an entry for each paper, document, or motion filed with the ALJ in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 263.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 263.38, a party may file with the Board written exceptions to the ALJ's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the ALJ to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board if the party taking exception had an opportunity to raise the same objection, issue, or argument before the ALJ and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the ALJ's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the ALJ's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 263.40 Review by the Board.

(a) *Notice of submission to the Board.* When the Board determines that the record in the proceeding is complete, the Board will serve notice upon the parties that the proceeding has been submitted to the Board for final decision.

(b) *Oral argument before the Board.* Upon the initiative of the Board or on the written request of any party filed with the Board within the time for filing exceptions, the Board may order and hear oral argument on the recommended findings, conclusions, decision, and order of the ALJ. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board's final decision. Oral argument before the Board must be on the record.

(c) *Board's final decision.* (1) Decisional employees may advise and assist the Board in the consideration and disposition of the case. The final decision of the Board will be based upon review of the entire record of the proceeding, except that the Board may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board will render a final decision within 90 days after

notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board orders that the action or any aspect thereof be remanded to the ALJ for further proceedings. Copies of the final decision and order of the Board will be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board or required by statute, upon any appropriate State or Federal supervisory authority.

§ 263.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Board may not, unless specifically ordered by the Board or a reviewing court, operate as a stay of any order issued by the Board. The Board may, in the Board's, and on such terms as the Board finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Subpart B—Board Local Rules Supplementing the Uniform Rules

§ 263.50 Purpose and scope.

(a) This subpart prescribes the rules of practice and procedure governing formal adjudications set forth in paragraph (b) of this section, and supplements the rules of practice and procedure contained in subpart A of this part.

(b) The rules and procedures of this subpart and subpart A of this part will apply to the formal adjudications set forth in § 263.1 and to the following adjudications:

(1) Suspension of a member bank from use of credit facilities of the Federal Reserve System under section 4 of the FRA (12 U.S.C. 301);

(2) Termination of a bank's membership in the Federal Reserve System under section 9 of the FRA (12 U.S.C. 327);

(3) Issuance of a cease-and-desist order under section 11 of the Clayton Act (15 U.S.C. 21);

(4) Adjudications under sections 2, 3, or 4 of the BHC Act (12 U.S.C. 1841, 1842, or 1843);

(5) Formal adjudications on bank merger applications under section 18(c) of the FDIA (12 U.S.C. 1828(c));

(6) Issuance of a divestiture order under section 5(e) of the BHC Act (12 U.S.C. 1844(e));

(7) Imposition of sanctions upon any municipal securities dealer for which the Board is the appropriate regulatory agency, or upon any person associated or seeking to become associated with such a municipal securities dealer, under section 15B(c)(5) of the Exchange Act (15 U.S.C. 78o–4);

(8) Proceedings where the Board otherwise orders that a formal hearing be held;

(9) Termination of the activities of a state branch, state agency, or commercial lending company subsidiary of a foreign bank in the United States, pursuant to section 7(e) of the IBA (12 U.S.C. 3105(d));

(10) Termination of the activities of a representative office of a foreign bank in the United States, pursuant to section 10(b) of the IBA (12 U.S.C. 3107(b));

(11) Issuance of a prompt corrective action directive to a member bank under section 38 of the FDI Act (12 U.S.C. 1831o);

(12) Reclassification of a member bank on grounds of unsafe or unsound condition under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(13) Reclassification of a member bank on grounds of unsafe and unsound practice under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(14) Issuance of an order requiring a member bank to dismiss a director or senior executive officer under section 38 (e)(5) and 38(f)(2) (F)(ii) of the FDI Act (12 U.S.C. 1831o(e)(5) and 1831o(f)(2) (F)(ii)); and

(15) Adjudications under section 10 of the HOLA (12 U.S.C. 1467a).

§ 263.51 Definitions.

As used in subparts B through G of this part:

(a) *Secretary* means the Secretary of the Board of Governors of the Federal Reserve System.

(b) *Member bank* means any bank that is a member of the Federal Reserve System.

(c) *Institution* has the same meaning as that assigned to it in subpart A of this part, and includes any foreign bank with a representative office in the United States.

§ 263.52 Address for filing.

All papers to be filed with the Board must be filed with the Secretary of the Board of Governors of the Federal Reserve System, Washington, DC 20551. All papers to be filed with the Board electronically must be sent to: *OSEC-Litigation@frb.gov*.

§ 263.53 Discovery depositions.

(a) *In general.* In addition to the discovery permitted in subpart A of this part, limited discovery by means of depositions will be allowed for individuals with knowledge of facts material to the proceeding that are not protected from discovery by any applicable privilege, and of identified expert witnesses. Except in unusual cases, accordingly, depositions will be permitted only of individuals identified as hearing witnesses, including experts. All discovery depositions must be completed within the time set forth in § 263.24(d).

(b) *Application.* A party who desires to take a deposition of any other party's proposed witnesses, must apply to the ALJ for the issuance of a deposition subpoena or subpoena duces tecum. The application must state the name and address of the proposed deponent, the subject matter of the testimony expected from the deponent and its relevancy to the proceeding, and the address of the place, the manner (*e.g.,* remote means, in person), and the time, no sooner than ten days after the service of the subpoena, for the taking of the deposition. Any such application must be treated as a motion subject to the rules governing motions practice set forth in § 263.23.

(c) *Issuance of subpoena.* The ALJ must issue the requested deposition subpoena or subpoena *duces tecum* upon a finding that the application satisfies the requirements of this section and of § 263.24. If the ALJ determines that the taking of the deposition or its proposed location or manner is, in whole or in part, unnecessary, unreasonable, oppressive, excessive in scope or unduly burdensome, the ALJ may deny the application or may grant it upon such conditions as justice may require. The party obtaining the deposition subpoena or subpoena *duces tecum* will be responsible for serving it on the deponent and all parties to the proceeding in accordance with § 263.11. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(d) *Motion to quash or modify.* A person named in a deposition subpoena or subpoena *duces tecum* may file a motion to quash or modify the subpoena or for the issuance of a protective order. Such motions must be filed within ten days following service of the subpoena, but in all cases at least five days prior to the commencement of the scheduled deposition. The motion must be accompanied by a statement of the reasons for granting the motion and a copy of the motion and the statement must be served on the party which requested the subpoena. Only the party requesting the subpoena may file a response to a motion to quash or modify, and any such response must be

filed within five days following service of the motion.

(e) *Enforcement of a deposition subpoena.* Enforcement of a deposition subpoena must be in accordance with the procedures set forth in § 263.27(d).

(f) *Conduct of the deposition.* The deponent must be duly sworn. By stipulation of the parties or order by the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely, without being in the physical presence of the deponent. Each party may examine the deponent with respect to all non-privileged, relevant, and material matters. Objections to questions or evidence must be in the short form, stating the ground for the objection. Failure to object to questions or evidence will not be deemed a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The discovery deposition must be transcribed or otherwise recorded as agreed among the parties.

(g) *Protective orders.* At any time during the taking of a discovery deposition, on the motion of any party or of the deponent, the ALJ may terminate or limit the scope and manner of the deposition upon a finding that grounds exist for such relief. Grounds for terminating or limiting the taking of a discovery deposition include a finding that the discovery deposition is being conducted in bad faith or in such a manner as to:

(1) Unreasonably annoy, embarrass, or oppress the deponent;

(2) Unreasonably probe into privilege, irrelevant, or immaterial matters; or

(3) Unreasonably attempt to pry into a party's preparation for trial.

§ 263.54 Delegation to the Office of Financial Institution Adjudication.

Unless otherwise ordered by the Board, administrative adjudications subject to subpart A of this part must be conducted by an ALJ of OFIA.

§ 263.55 Board as Presiding Officer.

The Board may, in its discretion, designate itself, one or more of its members, or an authorized officer, to act as presiding officer in a formal hearing. In such a proceeding, the authority of Board or its designee will include all the authority provided to an ALJ under this part. Proposed findings and conclusions, briefs, and other submissions by the parties permitted in subpart A of this part must be filed with the Secretary for consideration by the Board. Sections 263.38 and 263.39 will not apply to proceedings conducted under this section.

§ 263.56 Initial licensing proceedings.

Proceedings with respect to applications for initial licenses will include, but not be limited to, applications for Board approval under section 3 of the BHC Act and section 10 of HOLA and such proceedings as may be ordered by the Board with respect to applications under section 18(c) of the FDIA. In such initial licensing proceedings, the procedures set forth in subpart A of this part will apply, except that the Board may designate a Board Counsel to represent the Board in a nonadversary capacity for the purpose of developing for the record information relevant to the issues to be determined by the Presiding Officer and the Board. In such proceedings, Board Counsel will be considered to be a decisional employee for purposes of §§ 263.9 and 263.40.

§ 263.57 Sanctions relating to conduct in an adjudicatory proceeding.

(a) *General rule.* The ALJ may impose sanctions when any party or person in an adjudicatory proceeding under this part has failed to comply with an applicable statute, regulation, or order, and that failure to comply:

(1) Constitutes contemptuous conduct;

(2) Materially injures or prejudices another party in terms of substantive injury, incurring additional expenses including attorney's fees, prejudicial delay, or otherwise;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Unduly delays the proceeding.

(b) *Sanctions.* Sanctions which may be imposed include any one or more of the following:

(1) Issuing an order against the party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from:

(i) Contesting specific issues or findings;

(ii) Offering certain evidence or challenging or contesting certain evidence offered by another party; or

(iii) Making a late filing or conditioning a late filing on any terms that are just;

(4) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act; and

(5) Excluding or suspending a party or person from the adjudicatory proceeding.

(c) *Procedure for imposition of sanctions.* (1) Upon the motion of any party, or on the ALJ's own motion, the ALJ may impose sanctions in accordance with this section. The ALJ must submit to the Board for final ruling the sanction of entering a final order determining the case on the merits.

(2) No sanction authorized by this section, other than refusal to accept late filings, must be imposed without prior notice to all parties and an opportunity for any party or person against whom sanctions would be imposed to be heard. Such opportunity to be heard may be on such notice, and the response may be in such form, as the ALJ directs. The ALJ may limit the opportunity to be heard to an opportunity of a party or person to respond orally immediately after the act or inaction covered by this section is noted by the ALJ.

(3) Requests for the imposition of sanctions by any party, and the imposition of sanctions, are subject to interlocutory review in the same manner as any other ruling by the ALJ.

(d) *Section not exclusive.* Nothing in this section precludes the ALJ or the Board from taking any other action, or imposing any restriction or sanction, authorized by applicable statute or regulation.

■ 21. Subpart K is added to read as follows:

Subpart K—Formal Investigative Proceedings

Sec.

Subpart K—Formal Investigative Proceedings

§ 263.450 Scope.

(a) The procedures of this subpart must be followed when a formal investigation is instituted and conducted pursuant to: section 8(n) of the FDIA (12 U.S.C. 1818(n)); section 10(c) of the FDIA (12 U.S.C. 1820(c)); section 7(j)(15) of the FDIA (12 U.S.C. 1817(j)(15)); section 5(f) of the Bank Holding Company Act (12 U.S.C. 1844(f)); sections 10(b)(4) and 10(g)(2) of HOLA (12 U.S.C. 1464(b)(4) and 1467a(g)(2)); or section 162 of the Dodd-Frank Act (12 U.S.C. 5362).

(b) Nothing in this subpart prohibits the Board from conducting informal investigations or obtaining information by any means other than a subpoena issued pursuant to this subpart.

(c) This subpart does not apply to adjudicatory proceedings as to which

hearings are required by statute, the rules for which are contained in part 262 of this chapter and subpart A of this part.

§ 263.451 Definitions.

As used in this subpart:

(a) *Formal investigative proceeding* means an investigation conducted pursuant to an order of investigation as provided in § 263.452(a).

(b) *Designated representative* means the person or persons empowered by the Board or by the General Counsel or his or her designees in accordance with 12 CFR 265.6 to conduct a formal investigative proceeding.

§ 263.452 Conduct of a formal investigative proceeding.

(a) A formal investigative proceeding may be initiated upon issuance of an order of investigation by the Board or by the General Counsel or his or her designees in accordance with 12 CFR 265.6. The order of investigation must indicate the purpose of the formal investigative proceeding and designate the Board's representatives to direct the conduct of the investigation.

(b) Any person who is compelled or requested to furnish documentary evidence or testimony at a formal investigative proceeding may, upon request, inspect a copy of the order of investigation at a time and place that the Board's designated representative determines to be appropriate. Any person who is compelled or requested to furnish documentary evidence or testimony in a formal investigative proceeding may not refuse to comply with a subpoena on the grounds that the order of investigation was not made available in advance of the date of production or testimony set forth in a subpoena.

(c) Copies of an order of investigation may not be produced to or retained by any person except with the express written approval of the Board officer supervising the investigation. The Board may provide a copy of an order of investigation, in whole or in part, if the Board officer concludes, in the officer's discretion, that disclosure of the order of investigation would not infringe upon the privacy of persons involved in the investigation or impede the conduct of the investigation.

§ 263.453 Powers of the designated representative.

The designated representative conducting the formal investigative proceeding will have the power to administer oaths and affirmations, to take and preserve testimony under oath, to issue subpoenas *ad testificandum* and subpoenas *duces tecum* and to apply for their enforcement to the United States District Court for the judicial district or the United States court in any territory in which the witness or company subpoenaed resides or conducts business, or such other judicial district provided by law.

§ 263.454 Confidentiality of proceedings.

Formal investigative proceedings conducted pursuant to this subpart are confidential and, unless otherwise ordered or permitted by the Board, or required by law, the entire record of any formal investigative proceeding, including the order of investigation authorizing the proceeding, the transcripts of such proceeding, and all documents and information obtained by the designated representative(s) during the course of the formal investigative proceeding will be confidential. If the Board issues a notice of charges or otherwise initiates an administrative (adjudicatory) hearing, disclosure of documents and information obtained by the Board's designated representative(s) during the course of the formal investigative proceeding will be governed by the Uniform Rules and the Board Local Rules Supplementing the Uniform Rules (subparts A and B of this part).

§ 263.455 Transcripts.

(a) Transcripts of testimony, if any, must be recorded by an official reporter, or by any other person or means designated by the designated representative conducting the investigation.

(b) Transcripts will be treated as confidential and must not be disclosed to any party except as provided in this subpart or as otherwise ordered or permitted by the Board, or required by law or regulation.

§ 263.456 Rights of witnesses.

(a) Any witness in a formal investigative proceeding may be accompanied and advised by an attorney personally representing that witness.

(1) Such attorney must be a member in good standing of the bar of any state, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or debarred from practice before the Board in accordance with any provision of this part, including paragraph (a)(4) of this section.

(2) Such attorney may advise the witness before, during, and after the taking of the witness' testimony and may briefly question the witness, on the record, at the conclusion of the witness' testimony, for the sole purpose of clarifying any of the answers the witness has given. During the taking of the testimony of a witness, such attorney may make summary notes solely for the attorney's use in representing the witness. Neither the attorney nor witness may retain copies of exhibits used or introduced in the course of a witness' testimony.

(3) All witnesses must be sequestered, and, unless permitted in the discretion of the designated representative, no witness or accompanying attorney may be present during the taking of testimony of any other witness called in such formal investigative proceeding. Attorneys for any other interested persons or entities will not, unless permitted in the discretion of the designated representative, have a right to be present during the testimony of any witness not personally being represented by such attorneys.

(4) The Board, for good cause, may exclude a particular attorney from further participation in any formal investigative proceeding in which the Board has found the attorney to have engaged in dilatory, obstructionist, egregious, contemptuous, or contumacious conduct. The designated representative conducting the formal investigative proceeding may report to the Board instances of apparently dilatory, obstructionist, egregious, contemptuous, or contumacious conduct on the part of an attorney. After due notice to the attorney, the Board may take such action as the circumstances warrant, including suspending any attorney representing a witness from further participation in the investigative proceeding, based upon a written record evidencing the conduct of the attorney in the formal investigative proceeding or such other or additional written or oral presentation as the Board may permit or direct.

(b) A witness may inspect the transcript of the witness' own testimony, without retaining a copy thereof, for the purpose of making non-substantive corrections to the transcript at a time and place that the designated representative determines to be appropriate in consideration of all relevant factors, including the convenience of the witness.

(c) A witness may, solely for the use of the witness and the witness' attorney, obtain a copy of the transcript of the witness' testimony, provided that the witness submits a written request for the transcript and the witness requesting a copy of the witness' testimony bears the cost thereof. However, the Board officer supervising the formal investigative

proceeding may deny such a request if, in the officer's discretion, the provision of the transcript may infringe the privacy of third persons involved in the investigation, or impede or interfere with the conduct of any investigation. If the Board issues a notice of charges or otherwise initiates an administrative (adjudicatory) hearing, disclosure of formal investigative transcripts obtained by the Board's designated representative(s) during the course of the formal investigative proceeding will be governed by the Uniform Rules and the Board Local Rules Supplementing the Uniform Rules (subparts A and B of this part).

§ 263.457 Subpoenas.

(a) *Service.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent which, in the case of a corporation or other association, is delivery to an officer, director, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail or by an express delivery service addressed to the person's or authorized agent's last known address; or

(5) In such other manner as is reasonably calculated to give actual notice.

(b) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing or testimony is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved. Foreign nationals are subject to such subpoenas if such service is made upon a duly authorized agent located in the United States or such other means permissible by law.

(c) *Witness fees and mileage.* Witnesses summoned in any proceeding under this subpart must be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Such fees and mileage need not be tendered when the subpoena is issued on behalf of the Board by any of its designated representatives.

■ 22. Appendix A is added to read as follows:

Appendix A to Part 263—Rules Applicable to Proceedings Initiated Before April 1, 2024

Note: The content of this appendix reproduces the Uniform Rules of Practice and Procedure and Board Local Rules Supplementing the Uniform Rules in 12 CFR part 263, subparts A and B, respectively, as of April 1, 2024, and apply only to adjudicatory proceedings initiated before April 1, 2024. Proceedings initiated on or after April 1, 2024, are not governed by the version of the rules set out in this appendix. Cross-references to part 263 (as well as to included sections) in this appendix are to those provisions as contained within this appendix.

Subpart A—Uniform Rules of Practice and Procedure

Subpart B—Board Local Rules Supplementing Uniform Rules

Subpart A—Uniform Rules of Practice and Procedure

§ 263.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (''FDIA'') (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Board of Governors of the Federal Reserve System (''Board'') should issue an order to approve or disapprove a person's proposed acquisition of a state member bank, bank holding company, or savings and loan holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the Board is the appropriate agency;

(e) Assessment of civil money penalties by the Board against institutions, institution-affiliated parties, and certain other persons for which the Board is the appropriate agency for any violation of:

(1) Any provision of the Bank Holding Company Act of 1956, as amended (''BHC Act''), or any order or regulation issued thereunder, pursuant to 12 U.S.C. 1847(b) and (d);

(2) Sections 19, 22, 23, 23A and 23B of the Federal Reserve Act (''FRA''), or any regulation or order issued

thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 504 and 505;

(3) Section 9 of the FRA pursuant to 12 U.S.C. 324;

(4) Section 106(b) of the Bank Holding Company Act Amendments of 1970 and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

(5) Any provision of the Change in Bank Control Act of 1978, as amended, or any regulation or order issued thereunder and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(6) Any provision of the International Lending Supervision Act of 1983 (''ILSA'') or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(7) Any provision of the International Banking Act of 1978 (''IBA'') or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(8) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(9) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3349), or any order or regulation issued thereunder;

(10) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the Board, the terms of any condition imposed in writing by the Board in connection with the grant of an application or request, and certain unsafe or unsound practices or breaches of fiduciary duty or law or regulation pursuant to 12 U.S.C. 1818(i)(2);

(11) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(12) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(13) Section 5 of the Home Owners' Loan Act (''HOLA'') or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464 (d), (s) and (v);

(14) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d); and

(15) Section 10 of the HOLA, pursuant to 12 U.S.C. 1467a (i) and (r);

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Removal, prohibition, and civil monetary penalty proceedings under section 10(k) of the FDI Act (12 U.S.C. 1820(k)) for violations of the special post-employment restrictions imposed by that section; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 263.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 263.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the Board's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Agency or the administrative law judge, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the Board in an adjudicatory proceeding.

(e) *Final order* means an order issued by the Board with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(f) *Institution* includes: (1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHC Act (12 U.S.C. 1841 *et seq.*);

(3) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(4) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof;

(5) Any Federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)); and

(6) Any savings and loan holding company or any subsidiary (other than a savings association) of a savings and loan holding company as those terms are defined in the HOLA (12 U.S.C. 1461 *et seq.*).

(g) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u)).

(h) *Local Rules* means those rules promulgated by the Board in this part other than subpart A.

(i) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the Board, the Office of Comptroller of the Currency (the *OCC*), the Federal Deposit Insurance Corporation (the *FDIC*), and the National Credit Union Administration (the *NCUA*).

(j) *Party* means the Board and any person named as a party in any notice.

(k) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency or other entity or organization, including an institution as defined in paragraph (f) of this section.

(l) *Respondent* means any party other than the Board.

(m) *Uniform Rules* means those rules in subpart A of this part that are common to the Board, the OCC, the FDIC, and the NCUA.

(n) *Violation* includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 263.4 Authority of the Board.

The Board may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 263.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 263.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 263.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the Board or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the Board if such attorney is not currently suspended or debarred from practice before the Board.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer, director, or employee is not currently suspended or debarred from practice before the Board.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Board, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 263.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statement is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 263.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 263.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 263.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the Board (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, a member of the Board, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the Board until the date that the Board issues its final decision pursuant to § 263.40(c):

(1) No interested person outside the Federal Reserve System shall make or knowingly cause to be made an *ex parte* communication to a member of the Board, the administrative law judge, or a decisional employee; and

(2) A member of the Board, administrative law judge, or decisional employee shall not make or knowingly cause to be made to any interested person outside the Federal Reserve System any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, a member of the Board or any other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the *ex parte* communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the Board in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 263.40, except as witness or counsel in public proceedings.

§ 263.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 263.25 and 263.26, shall be filed with OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Board or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 8½ × 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 263.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the Board and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Board, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 263.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 263.10(c).

(c) *By the Board or the administrative law judge.* (1) All papers required to be served by the Board or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 263.6, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 263.6, the Board or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent, which, in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method as is reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United

States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 263.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same-day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Board or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 263.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board pursuant to § 263.38, the Board may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or *sua sponte* by the Board or the administrative law judge.

§ 263.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the Board is the party requesting the subpoena. The Board shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the Board.

§ 263.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any Board representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 263.16 The Board's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the Board or any Federal Reserve Bank to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the Board or any Federal Reserve Bank to conduct or continue any form of investigation authorized by law.

§ 263.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 263.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the Board.

(ii) The notice must be served by the Board upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with OFIA.

(2) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the Board.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the Board's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the Board is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing shall be filed with OFIA.

§ 263.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Board a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 263.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 263.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Board a recommended decision containing the findings and the relief sought in the notice.

§ 263.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule shall be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 263.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Board.

(d) *Responses.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Board, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 263.29 and 263.30.

§ 263.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term ''documents'' may be defined to include drawings, graphs,

charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by § 263.53 of subpart B of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 263.25.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 263.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per-page copying rate imposed by 12 CFR part 261 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 263.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in accordance with this paragraph and § 263.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 263.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party

who fails to produce subpoenaed documents.

§ 263.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 263.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 263.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 263.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness's testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon a showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness's unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to

an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 263.28 Interlocutory review.

(a) *General rule.* The Board may review a ruling of the administrative law judge prior to the certification of the record to the Board only in accordance with the procedures set forth in this section and § 263.23.

(b) *Scope of review.* The Board may exercise interlocutory review of a ruling of the administrative law judge if the Board finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 263.23. Any party may file a response to a request for interlocutory review in accordance with § 263.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Board for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Board under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Board.

§ 263.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Board issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Board. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 263.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 263.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a ''scheduling conference.'' The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the

proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 263.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 263.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the Board, in the Board's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Board a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Board. The form of, and procedure for, these requests and replies are governed by § 263.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 263.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena duces tecum requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 263.26(c).

§ 263.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

§ 263.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Board shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institutions regulatory agency or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 263.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 263.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 263.37(b), the administrative law judge shall file with and certify to the Board, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Board for final determination the record of the proceeding, the administrative law judge shall furnish to the Board a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 263.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 263.38, a party may file with the Board written exceptions to the administrative law judge's recommended decision, findings, conclusions or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 263.40 Review by the Board.

(a) *Notice of submission to the Board.* When the Board determines that the record in the proceeding is complete, the Board shall serve notice upon the parties that the proceeding has been submitted to the Board for final decision.

(b) *Oral argument before the Board.* Upon the initiative of the Board or on the written request of any party filed with the Board within the time for filing exceptions, the Board may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board's final decision. Oral argument before the Board must be on the record.

(c) *Agency final decision.* (1) Decisional employees may advise and assist the Board in the consideration and disposition of the case. The final decision of the Board will be based upon review of the entire record of the proceeding, except that the Board may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Board shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board or required by statute, upon any appropriate state or Federal supervisory authority.

§ 263.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the Board may not, unless specifically ordered by the Board or a reviewing court, operate as a stay of any order issued by the Board. The Board may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any part of its order pending a final decision on a petition for review of that order.

Subpart B—Board Local Rules Supplementing the Uniform Rules

§ 263.50 Purpose and scope.

(a) This subpart prescribes the rules of practice and procedure governing formal adjudications set forth in § 263.50(b) of this subpart, and supplements the rules of practice and procedure contained in subpart A of this part.

(b) The rules and procedures of this subpart and subpart A of this part shall apply to the formal adjudications set forth in § 263.1 of subpart A and to the following adjudications:

(1) Suspension of a member bank from use of credit facilities of the Federal Reserve System under section 4 of the FRA (12 U.S.C. 301);

(2) Termination of a bank's membership in the Federal Reserve System under section 9 of the FRA (12 U.S.C. 327);

(3) Issuance of a cease-and-desist order under section 11 of the Clayton Act (15 U.S.C. 21);

(4) Adjudications under sections 2, 3, or 4 of the BHC Act (12 U.S.C. 1841, 1842, or 1843);

(5) Formal adjudications on bank merger applications under section 18(c) of the FDIA (12 U.S.C. 1828(c));

(6) Issuance of a divestiture order under section 5(e) of the BHC Act (12 U.S.C. 1844(e));

(7) Imposition of sanctions upon any municipal securities dealer for which the Board is the appropriate regulatory agency, or upon any person associated or seeking to become associated with such a municipal securities dealer, under section 15B(c)(5) of the Exchange Act (15 U.S.C. 78o–4);

(8) Proceedings where the Board otherwise orders that a formal hearing be held;

(9) Termination of the activities of a state branch, state agency, or commercial lending company subsidiary of a foreign bank in the United States, pursuant to section 7(e) of the IBA (12 U.S.C. 3105(d));

(10) Termination of the activities of a representative office of a foreign bank in the United States, pursuant to section 10(b) of the IBA (12 U.S.C. 3107(b));

(11) Issuance of a prompt corrective action directive to a member bank under section 38 of the FDI Act (12 U.S.C. 1831o);

(12) Reclassification of a member bank on grounds of unsafe or unsound condition under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(13) Reclassification of a member bank on grounds of unsafe and unsound practice under section 38(g)(1) of the FDI Act (12 U.S.C. 1831o(g)(1));

(14) Issuance of an order requiring a member bank to dismiss a director or senior executive officer under section 38 (e)(5) and 38(f)(2) (F)(ii) of the FDI Act (12 U.S.C. 1831o(e)(5) and 1831o(f)(2) (F)(ii));

(15) Adjudications under section 10 of the HOLA (12 U.S.C. 1467a).

§ 263.51 Definitions.

As used in subparts B through G of this part:

(a) *Secretary* means the Secretary of the Board of Governors of the Federal Reserve System;

(b) *Member bank* means any bank that is a member of the Federal Reserve System.

(c) *Institution* has the same meaning as that assigned to it in § 263.3(f) of subpart A, and includes any foreign bank with a representative office in the United States.

§ 263.52 Address for filing.

All papers to be filed with the Board shall be filed with the Secretary of the Board of Governors of the Federal Reserve System, Washington, DC 20551.

§ 263.53 Discovery depositions.

(a) *In general.* In addition to the discovery permitted in subpart A of this part, limited discovery by means of depositions shall be allowed for individuals with knowledge of facts material to the proceeding that are not protected from discovery by any applicable privilege, and of identified expert witnesses. Except in unusual cases, accordingly, depositions will be permitted only of individuals identified as hearing witnesses, including experts. All discovery depositions must be completed within the time set forth in § 263.24(d).

(b) *Application.* A party who desires to take a deposition of any other party's proposed witnesses, shall apply to the administrative law judge for the issuance of a deposition subpoena or subpoena duces tecum. The application shall state the name and address of the proposed deponent, the subject matter of the testimony expected from the deponent and its relevancy to the proceeding, and the address of the place and the time, no sooner than ten days after the service of the subpoena, for the taking of the deposition. Any such application shall be treated as a motion subject to the rules governing motions practice set forth in § 263.23.

(c) *Issuance of subpoena.* The administrative law judge shall issue the requested deposition subpoena or subpoena duces tecum upon a finding that the application satisfies the requirements of this section and of § 263.24. If the administrative law judge determines that the taking of the deposition or its proposed location is, in whole or in part, unnecessary, unreasonable, oppressive, excessive in scope or unduly burdensome, he or she may deny the application or may grant it upon such conditions as justice may require. The party obtaining the deposition subpoena or subpoena duces tecum shall be responsible for serving it on the deponent and all parties to the proceeding in accordance with § 263.11.

(d) *Motion to quash or modify.* A person named in a deposition subpoena or subpoena duces tecum may file a motion to quash or modify the subpoena or for the issuance of a protective order. Such motions must be filed within ten days following service of the subpoena, but in all cases at least five days prior to the commencement of the scheduled deposition. The motion must be accompanied by a statement of the reasons for granting the motion and a copy of the motion and the statement must be served on the party which requested the subpoena. Only the party requesting the subpoena may file a response to a motion to quash or modify, and any such response shall be filed within five days following service of the motion.

(e) *Enforcement of a deposition subpoena.* Enforcement of a deposition subpoena shall be in accordance with the procedures set forth in § 263.27(d).

(f) *Conduct of the deposition.* The deponent shall be duly sworn, and each party shall have the right to examine the deponent with respect to all non-privileged, relevant and material matters. Objections to questions or evidence shall be in the short form, stating the ground for the objection. Failure to object to questions or evidence shall not be deemed a waiver except where the grounds for the objection might have been avoided if the objection had been timely presented. The discovery deposition shall be transcribed or otherwise recorded as agreed among the parties.

(g) *Protective orders.* At any time during the taking of a discovery deposition, on the motion of any party or of the deponent, the administrative law judge may terminate or limit the scope and manner of the deposition upon a finding that grounds exist for such relief. Grounds for terminating or limiting the taking of a discovery deposition include a finding that the discovery deposition is being conducted in bad faith or in such a manner as to:

(1) Unreasonably annoy, embarrass, or oppress the deponent;

(2) Unreasonably probe into privilege, irrelevant or immaterial matters; or

(3) Unreasonably attempt to pry into a party's preparation for trial.

§ 263.54 Delegation to the Office of Financial Institution Adjudication.

Unless otherwise ordered by the Board, administrative adjudications subject to subpart A of this part shall be conducted by an administrative law judge of OFIA.

§ 263.55 Board as Presiding Officer.

The Board may, in its discretion, designate itself, one or more of its members, or an authorized officer, to act as presiding officer in a formal hearing. In such a proceeding, proposed findings and conclusions, briefs, and other submissions by the parties permitted in subpart A shall be filed with the Secretary for consideration by the Board. Sections 263.38 and 263.39 of subpart A will not apply to proceedings conducted under this section.

§ 263.56 Initial licensing proceedings.

Proceedings with respect to applications for initial licenses shall include, but not be limited to, applications for Board approval under section 3 of the BHC Act and section 10 of HOLA and such proceedings as may be ordered by the Board with respect to applications under section 18(c) of the FDIA. In such initial licensing proceedings, the procedures set forth in subpart A of this part shall apply, except that the Board may designate a Board Counsel to represent the Board in a nonadversary capacity for the purpose of developing for the record information relevant to the issues to be determined by the Presiding Officer and the Board. In such proceedings, Board Counsel shall be considered to be a decisional employee for purposes of §§ 263.9 and 263.40 of subpart A.

FEDERAL DEPOSIT INSURANCE CORPORATION

For the reasons set out in the joint preamble, the FDIC amends 12 CFR part 308 as follows.

■ 23. The authority section for part 308 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78o(c)(4), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104–134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109–351, 120 Stat. 1966; Pub. L. 111–203, 124 Stat. 1376; Pub. L. 114–74, sec. 701, 129 Stat. 584.

■ 24. Subparts A and B are revised to read as follows:

Subpart A—Uniform Rules of Practice and Procedure

Sec.

Subpart A—Uniform Rules of Practice and Procedure

§ 308.0 Applicability date.

These Uniform Rules set out in this subpart apply to adjudicatory proceedings initiated on or after April 1, 2024. Any adjudicatory proceedings initiated before April 1, 2024, continue to be governed by the previous version of the Uniform Rules included in appendix A of this part.

§ 308.1 Scope.

This subpart prescribes Uniform Rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal Deposit Insurance Act (FDIA) (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Federal Deposit Insurance Corporation (FDIC) should issue an order to approve or disapprove a person's proposed acquisition of an institution;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78o–5), to impose sanctions upon any Government securities broker or dealer or upon any person associated or seeking to become associated with a Government securities broker or dealer for which the FDIC is the appropriate agency;

(e) Assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate agency for any violation of:

(1) Sections 22(h) and 23 of the Federal Reserve Act (FRA), or any implementing regulation, and certain unsafe or unsound practices or breaches of fiduciary duty under 12 U.S.C. 1828(j) or 12 U.S.C. 1468;

(2) Section 106(b) of the Bank Holding Company Act Amendments of 1970 (BHCA Amendments of 1970), and certain unsafe or unsound practices or breaches of fiduciary duty under 12 U.S.C. 1972(2)(F);

(3) Any provision of the Change in Bank Control Act of 1978, as amended (CBCA), or any implementing regulation or order issued, and certain unsafe or unsound practices, or breaches of fiduciary duty under 12 U.S.C. 1817(j)(16);

(4) Section 7(a)(1) of the FDIA under 12 U.S.C. 1817(a)(1);

(5) Any provision of the International Lending Supervision Act of 1983 (ILSA), or any rule, regulation or order issued under 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 (IBA), or any rule, regulation or order issued under 12 U.S.C. 3108;

(7) Certain provisions of the Exchange Act under section 21B of the Exchange Act (15 U.S.C. 78u–2);

(8) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 3349), or any order or regulation issued under;

(9) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the FDIC, or the former Office of Thrift Supervision (OTS), the terms of any condition imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided under 12 U.S.C. 1818(i)(2);

(10) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued under; and

(11) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued under;

(12) Certain provisions of Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued under 12 U.S.C. 1464(d)(1), (5)–(8), (s), and (v);

(13) Section 9 of the HOLA or any regulation or order issued under 12 U.S.C. 1467(d); and

(14) Section 10 of HOLA under 12 U.S.C. 1467a(a)(2)(D), (g), (i)(2)–(4) and (r);

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties for violations of the post-employment restrictions under section 10(k); and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules (see § 308.3(n)).

§ 308.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 308.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

(a) *Administrative law judge (ALJ)* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Administrative Officer* means an inferior officer of the Federal Deposit Insurance Corporation (FDIC), duly appointed by the Board of Directors of the FDIC to serve as the Board's designee to hear certain motions or requests in an adjudicatory proceeding and to be the official custodian of the record for the FDIC.

(c) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(d) *Assistant Administrative Officer* means an inferior officer of the FDIC, duly appointed by the Board of Directors of the FDIC to serve as the Board's designee to hear certain motions or requests in an adjudicatory proceeding upon the designation or unavailability of the Administrative Officer.

(e) *Board of Directors* or *Board* means the Board of Directors of the FDIC or its designee.

(f) *Decisional employee* means any member of the FDIC's or ALJ's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Board of Directors, ALJ or the Administrative Officer, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(g) *Designee* of the Board of Directors means officers or officials of the FDIC acting pursuant to authority delegated by the Board of Directors.

(h) *Electronic signature* means affixing the equivalent of a signature to an electronic document filed or transmitted electronically.

(i) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the FDIC in an adjudicatory proceeding.

(j) *FDIC* means the Federal Deposit Insurance Corporation.

(k) *Final order* means an order issued by the FDIC with or without the consent of the affected institution or the institution-affiliated party that has become final, without regard to the pendency of any petition for reconsideration or review.

(l) *Institution* includes:

(1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHCA (12 U.S.C. 1841 *et seq.*);

(3) Any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467a(a));

(4) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(5) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof; and

(6) Any Federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)).

(m) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 3(u) of the FDIA (12 U.S.C. 1813(u).

(n) *Local Rules* means those rules promulgated by the FDIC in those subparts of this part other than this subpart.

(o) *Office of Financial Institution Adjudication (OFIA)* means the executive body charged with overseeing the administration of administrative enforcement proceedings of the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve Board (Board of Governors), the FDIC, and the National Credit Union Administration (NCUA).

(p) *Party* means the FDIC and any person named as a party in any notice.

(q) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in this section.

(r) *Respondent* means any party other than the FDIC.

(s) *Uniform Rules* means those rules in this subpart A that pertain to the types of formal administrative enforcement actions set forth at § 308.1, and as specified in subparts B through P of this part.

(t) *Violation* means any violation as that term is defined in section 3(v) of the FDIA (12 U.S.C. 1813(v)).

§ 308.4 Authority of the Board of Directors.

The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the ALJ.

§ 308.5 Authority of the administrative law judge (ALJ).

(a) *General rule.* All proceedings governed by this part must be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The ALJ has all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The ALJ has all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* protective orders, and other orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 308.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors has the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board of Directors a recommended decision as provided in this subpart;

(9) To recuse oneself by motion made by a party or on the ALJ's own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of an ALJ.

§ 308.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the FDIC or an ALJ*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the FDIC if such attorney is not currently suspended or debarred from practice before the FDIC.

(2) *By non-attorneys.* An individual may appear on the individual's own behalf.

(3) *Notice of appearance.* (i) Any individual acting on the individual's own behalf or as counsel on behalf of a party, including the FDIC, must file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include:

(A) A written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (2) of this section and is authorized to represent the particular party; and

(B) A written acknowledgement that the individual has reviewed and will comply with the Uniform Rules and Local Rules in subpart B of this part.

(ii) By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that the counsel is authorized to accept service on behalf of the

represented party and that, in the event of withdrawal from representation, the counsel will, if required by the ALJ, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 308.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice must be signed by at least one counsel of record in the counsel's individual name and must state that counsel's mailing address, electronic mail address, and telephone number. A party who acts as the party's own counsel must sign that person's individual name and state that person's mailing address, electronic mail address, and telephone number on every filing or submission of record. Electronic signatures may be used to satisfy the signature requirements of this section.

(b) *Effect of signature.* (1) The signature of counsel or a party will constitute a certification: the counsel or party has read the filing or submission of record; to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the ALJ will strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the counsel's or party's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 308.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person may appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The ALJ may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 308.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 308.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the FDIC (including such person's counsel); and

(ii) The ALJ handling that proceeding, the Board of Directors, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the FDIC until the date that the Board of Directors issues a final decision pursuant to § 308.40(c):

(1) An interested person outside the FDIC must not make or knowingly cause to be made an *ex parte* communication to any member of the Board of Directors, the ALJ, or a decisional employee; and

(2) Any member of the Board of Directors, ALJ, or decisional employee may not make or knowingly cause to be made to any interested person outside the FDIC any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by the ALJ, any member of the Board of Directors, or any other person identified in paragraph (a) of this section, that person will cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding may, within ten days of service of the *ex parte* communication, file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The ALJ or the Board of Directors then determines whether any action should be taken concerning the *ex parte* communication in accordance with paragraph (d) of this section.

(d) *Sanctions.* Any party or counsel to a party who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board of Directors or the ALJ including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions*—(1) *In general.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the ALJ may not:

(i) Consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or

(ii) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the FDIC.

(2) *Decision process.* An employee or agent engaged in the performance of investigative or prosecuting functions for the FDIC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 308.40, except as witness or counsel in administrative or judicial proceedings.

§ 308.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 308.25 and 308.26, must be filed with OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board of Directors or the ALJ, filing may be accomplished by:

(1) Electronic mail or other electronic means designated by the Board of Directors or the ALJ;

(2) Personal service;

(3) Delivering the papers to a same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, mailing address, electronic mail address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on an 8 1/2×11 inch page and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 308.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the FDIC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

§ 308.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers must serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party must use one of the following methods of service:

(1) Electronic mail or other electronic means;

(2) Personal service;

(3) Delivering the papers by same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *By the Board of Directors or the ALJ.* (1) All papers required to be served by the Board of Directors or the ALJ upon a party who has appeared in the proceeding in accordance with § 308.6 will be served by electronic mail or other electronic means designated by the Board of Directors or ALJ.

(2) If a respondent has not appeared in the proceeding in accordance with § 308.6, the Board of Directors or the ALJ will serve the respondent by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the respondent;

(iv) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the respondent's last known mailing address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the person's last known mailing address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved.

§ 308.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of transmission by electronic mail or other electronic means, upon transmittal by the serving party;

(ii) In the case of overnight delivery service or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of personal service or same day courier delivery, upon actual service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board of Directors or ALJ in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by electronic mail or other electronic means or by same day courier delivery, add one calendar day to the prescribed period;

(2) If service is made by overnight delivery service, add two calendar days to the prescribed period; or

(3) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period.

§ 308.13 Change of time limits.

Except as otherwise provided by law, the ALJ may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board of Directors pursuant to § 308.38, the Board of Directors may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Board of Directors' or the ALJ's own motion.

§ 308.14 Witness fees and expenses.

(a) *In general.* A witness, including an expert witness, who testifies at a deposition or hearing will be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, except as provided in paragraph (b) of this section and unless otherwise waived.

(b) *Exception for testimony by a party.* In the case of testimony by a party, no witness fees or mileage need to be paid. The FDIC will not be required to pay any fees to, or expenses of, any witness not subpoenaed by the FDIC.

(c) *Timing of payment.* Fees and mileage in accordance with this paragraph (c) must be paid in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the FDIC is the party requesting the subpoena.

§ 308.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. Any such offer or proposal may only be made to Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 308.16 FDIC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the FDIC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the FDIC to conduct or continue any form of investigation authorized by law.

§ 308.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 308.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA, 12 U.S.C. 1817(j)(4), a proceeding governed by this subpart is commenced by issuance of a notice by the FDIC.

(ii) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law. Enforcement Counsel may serve the notice upon counsel for the respondent, provided that Enforcement Counsel has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent.

(iii) Enforcement Counsel must file the notice with OFIA.

(2) Change-in control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the FDIC.

(b) *Contents of notice.* Notice pleading applies. The notice must provide:

(1) The legal authority for the proceeding and for the FDIC's jurisdiction over the proceeding;

(2) Matters of fact or law showing that the FDIC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing must be filed with OFIA.

§ 308.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent must file an answer as designated in the notice. In a civil money penalty proceeding, respondent must also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the respondent lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief, or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of the respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order of the Board of Directors without further action by the ALJ.

§ 308.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board of Directors or ALJ orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the ALJ may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the ALJ that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The ALJ may grant a continuance to enable the objecting party to meet such evidence.

§ 308.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the ALJ will file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice.

§ 308.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the ALJ's own motion, the ALJ may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence, or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The ALJ may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the ALJ finds:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 308.23 Motions.

(a) *In writing.* (1) Except as otherwise provided in this section, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the ALJ. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the ALJ directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the ALJ, except that following the filing of the recommended decision, motions must be filed with the Board of Directors.

(d) *Responses.* (1) Except as otherwise provided in this section, within ten days after service of any written motion, or within such other period of time as may be established by the ALJ or the Administrative Officer, any party may file a written response to a motion. The ALJ will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 308.29 and 308.30.

§ 308.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term *documents* includes writings, drawings, graphs, charts, photographs, recordings, electronically stored information, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party, into a reasonably usable form.

(2) Discovery by use of deposition is governed by subpart B of this part.

(3) Discovery by use of either interrogatories or requests for admission is not permitted.

(4) Any request to produce documents that calls for irrelevant material; or that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, or the time provided to respond in the request is inadequate.

(b) *Relevance.* A party may obtain document discovery regarding any non-privileged matter that has material relevance to the merits of the pending action.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit are permitted, unless the ALJ finds on the record that good cause exists for waiving the requirements of this paragraph (d).

§ 308.25 Request for document discovery from parties.

(a) *Document requests.* (1) Any party may serve on any other party a request to produce and permit the requesting party or its representative to inspect or copy any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. In the case of a request for inspection, the responding party may produce copies of documents or of electronically stored information instead of permitting inspection.

(2) The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected or produced; and

(ii) Must specify a reasonable time, place, and manner for the inspection or production.

(b) *Production or copying*—(1) *General.* Unless otherwise specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories of the request, and electronically stored information must be produced in a form in which it is ordinarily maintained or in a reasonably usable form.

(2) *Costs.* The producing party must pay its own costs to respond to a discovery request, unless otherwise agreed by the parties.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within 20 days of being served with such request, file a motion in accordance with the provisions of § 308.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to must be specified. Any objections not made in accordance with this paragraph and § 308.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within ten days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, or any other privileges of the Constitution, any applicable act of Congress, or the principles of common law, or are voluminous, these documents may be identified by category instead of by individual document. The ALJ retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 308.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the document request may file a written response to a motion to compel within ten days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the ALJ will rule promptly on all motions filed pursuant to this section. If the ALJ determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, the ALJ may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the ALJ. Notwithstanding any other provision in this part, the ALJ may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the ALJ its intention to file a timely motion for interlocutory review of the ALJ's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the ALJ issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena will not in any manner limit the sanctions that may be imposed by the ALJ against a party who fails to produce subpoenaed documents.

§ 308.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the ALJ for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party must specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party may apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 308.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The ALJ will promptly issue any document subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. The motion must be accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 308.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ, which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the ALJ has not quashed or modified. A party's right to seek court enforcement of a document subpoena will in no way limit the sanctions that may be imposed by the ALJ on a party who induces a failure to comply with subpoenas issued under this section.

§ 308.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the ALJ for the issuance of a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The ALJ may issue a deposition subpoena under this section upon showing:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time, manner, and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the ALJ requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the ALJ orders otherwise, no deposition under this section may be taken on fewer than ten days' notice to the witness and all parties.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the ALJ to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Each party must have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the ALJ for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition must certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section, or fails to comply with any order of the ALJ, which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the ALJ on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 308.28 Interlocutory review.

(a) *General rule.* The Board of Directors may review a ruling of the ALJ prior to the certification of the record to the Board of Directors only in accordance with the procedures set forth in this section and § 308.23.

(b) *Scope of review.* The Board of Directors may exercise interlocutory review of a ruling of the ALJ if the Board of Directors finds:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review must be filed by a party with the ALJ within ten days of the ruling and must otherwise comply with § 308.23. Any party may file a response to a request for interlocutory review in accordance with § 308.23(d). Upon the expiration of the time for filing all responses, the ALJ will refer the matter to the Board of Directors for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Board of Directors under this section suspends or stays the proceeding unless otherwise ordered by the ALJ or the Board of Directors.

§ 308.29 Summary disposition.

(a) *In general.* The ALJ will recommend that the Board of Directors issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes there is no genuine issue of material fact to be determined and that the party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the ALJ, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends supports the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the written request of any party or on the ALJ's own motion, the ALJ may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the ALJ will determine whether the moving party is entitled to summary disposition. If the ALJ determines that summary disposition is warranted, the ALJ will submit a recommended decision to that effect to the Board of Directors. If the ALJ finds that no party is entitled to summary disposition, the ALJ will make a ruling denying the motion.

§ 308.30 Partial summary disposition.

If the ALJ determines that a party is entitled to summary disposition as to certain claims only, the ALJ will defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the ALJ has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 308.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding, the ALJ will direct counsel for all parties to meet with the ALJ at a specified time and manner prior to the hearing for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a ''scheduling conference.'' The schedule for the identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits, and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The ALJ may, in addition to the scheduling conference, on the ALJ's own motion or at the request of any party, direct counsel for the parties to confer with the ALJ at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The ALJ may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at the party's expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the ALJ will serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 308.32 Prehearing submissions.

(a) *Party prehearing submissions.* Within the time set by the ALJ, but in no case later than 20 days before the start of the hearing, each party must file with the ALJ and serve on every other party:

(1) A prehearing statement that states:

(i) The party's position with respect to the legal issues presented;

(ii) The statutory and case law upon which the party relies; and

(iii) The facts that the party expects to prove at the hearing;

(2) A final list of witnesses to be called to testify at the hearing, including the name, mailing address, and electronic mail address of each witness and a short summary of the expected testimony of each witness, which need not identify the exhibits to be relied upon by each witness at the hearing;

(3) A list of the exhibits expected to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 308.33 Public hearings.

(a) *General rule.* All hearings must be open to the public, unless the FDIC, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Administrative Officer a request for a private hearing, and any party may file a reply to such a request. A party must serve on the ALJ a copy of any request or reply the party files with the Administrative Officer. The form of, and procedure for, these requests and replies are governed by § 308.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in Enforcement Counsel's discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The ALJ will take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 308.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the ALJ may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application must serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the ALJ.

(3) The ALJ will promptly issue any hearing subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the ALJ, the party making the application must serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may

file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 308.26(c).

§ 308.35 Conduct of hearings.

(a) *General rules.* (1) *Conduct of hearings.* Hearings must be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel will present its case-in-chief first, unless otherwise ordered by the ALJ, or unless otherwise expressly specified by law or regulation. Enforcement Counsel will be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the ALJ will fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the ALJ may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the ALJ directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The ALJ may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the ALJ's own motion.

(c) *Electronic presentation.* Based on the circumstances of each hearing, the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If the ALJ requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs, unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

§ 308.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable, and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the ALJ or the Board of Directors must appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, must be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection, or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a State regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the ALJ's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what the examining counsel expected to prove by the expected testimony of the witness either by representation of counsel or by direct questioning of the witness.

(3) The ALJ will retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board of Directors.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the ALJ may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 308.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the ALJ will serve notice upon each party that the certified transcript,

together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the ALJ proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the ALJ or within such longer period as may be ordered by the ALJ.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the ALJ any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The ALJ will not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 308.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 308.37(b), the ALJ will file with and certify to the Administrative Officer, for decision, the record of the proceeding. The record must include the ALJ's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The ALJ will serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the ALJ files with and certifies to the Administrative Officer for final determination the record of the proceeding, the ALJ will furnish to the Administrative Officer a certified index of the entire record of the proceeding. The certified index must include, at a minimum, an entry for each paper, document, or motion filed with the ALJ in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 308.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 308.38, a party may file with the Administrative Officer written exceptions to the ALJ's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the ALJ to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board of Directors if the party taking exception had an opportunity to raise the same objection, issue, or argument before the ALJ and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the ALJ's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the ALJ's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 308.40 Review by the Board of Directors.

(a) *Notice of submission to the Board of Directors.* When the Administrative Officer determines that the record in the proceeding is complete, the Administrative Officer will serve notice upon the parties that the proceeding has been submitted to the Board of Directors for final decision.

(b) *Oral argument before the Board of Directors.* Upon the initiative of the Board of Directors or on the written request of any party filed with the Administrative Officer within the time for filing exceptions, the Board of Directors may order and hear oral argument on the recommended findings, conclusions, decision, and order of the ALJ. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board of Directors' final decision. Oral argument before the Board of Directors must be on the record.

(c) *Board of Directors' final decision.* (1) Decisional employees may advise and assist the Board of Directors in the consideration and disposition of the case. The final decision of the Board of Directors will be based upon review of the entire record of the proceeding, except that the Board of Directors may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board of Directors will render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board of Directors orders that the action or any aspect thereof be remanded to the ALJ for further proceedings. Copies of the final decision and order of the Board of Directors will be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board of Directors or required by statute, upon any appropriate State or Federal supervisory authority.

§ 308.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the FDIC may not, unless specifically ordered by the Board of Directors or a reviewing court, operate as a stay of any order issued by the FDIC. The Board of Directors may, in its discretion, and on such terms as the Board of Directors finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Subpart B—General Rules of Procedure

§ 308.100 Applicability date.

These Local Rules in this subpart B apply to adjudicatory proceedings initiated on or after April 1, 2024. Any adjudicatory proceedings initiated before April 1, 2024, continue to be governed by the previous version of the Local Rules included in appendix A to this part.

§ 308.101 Scope of Local Rules.

(a) This subpart B and subpart C of this part prescribe rules of practice and procedure to be followed in the administrative enforcement proceedings initiated by the FDIC as set forth in § 308.1.

(b) Except as otherwise specifically provided, the Uniform Rules and subpart B of the Local Rules will not apply to subparts D through T of this part.

(c) Subpart C of this part will apply to any administrative proceeding initiated by the FDIC.

(d) Subparts A through C of this part prescribe the rules of practice and procedure to applicable to adjudicatory proceedings as to which hearings on the record are provided for by the assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of 15 U.S.C. 78o(c)(4).

§ 308.102 Authority of Board of Directors and Administrative Officer.

(a) *The Board of Directors.* (1) The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the Administrative Officer.

(2) Nothing contained in this part shall be construed to limit the power of the Board of Directors granted by applicable statutes or regulations.

(b) *The Administrative Officer.* (1) When no ALJ has jurisdiction over a proceeding, the Administrative Officer may act in place of, and with the same authority as, an ALJ, except that the Administrative Officer may not hear a case on the merits or make a recommended decision on the merits to the Board of Directors.

(2) Pursuant to authority delegated by the Board of Directors, the Administrative Officer and Assistant Administrative Officer, upon the advice and recommendation of the Deputy General Counsel for Litigation or, in the Deputy General Counsel's absence, the Assistant General Counsel for General Litigation, may issue rulings in proceedings under 12 U.S.C. 1817(j), 1818 1828(j), 1829, 1831i, and 1831*o* concerning:

(i) Denials of requests for private hearing;

(ii) Interlocutory appeals;

(iii) Stays pending judicial review;

(iv) Reopenings of the record and/or remands of the record to the ALJ;

(v) Supplementation of the evidence in the record;

(vi) All remands from the courts of appeals not involving substantive issues;

(vii) Extensions of stays of orders terminating deposit insurance; and

(viii) All matters, including final decisions, in proceedings under 12 U.S.C. 1818(g).

§ 308.103 Assignment of Administrative Law Judge (ALJ).

(a) *Assignment.* Unless otherwise directed by the Board of Directors or as otherwise provided in the Local Rules, a hearing within the scope of this part must be held before an ALJ of the Office of Financial Institution Adjudication (OFIA).

(b) *Procedures.* Upon receiving a copy of the notice under § 308.18(a) from Enforcement Counsel, OFIA must assign an ALJ to the matter and advise the parties, in writing, of the ALJ assignment.

§ 308.104 Filings with the Board of Directors.

(a) *General rule.* All materials required to be filed with or referred to the Board of Directors in any proceedings under this part must be filed with the Administrative Officer in a manner specified in § 308.10(b). The Administrative Officer's address is: Federal Deposit Insurance Corporation, Attn: Administrative Officer, 550 17th Street NW, Washington, DC 20429. Electronic copies of all pleadings must be sent to *ESSEnforcementActionDocket@fdic.gov* with the docket number clearly identified.

(b) *Scope.* Filings to be made with the Administrative Officer include pleadings and motions filed during the proceeding; the record filed by the ALJ after the issuance of a recommended decision; the recommended decision filed by the ALJ following a motion for summary disposition; referrals by the ALJ of motions for interlocutory review; motions and responses to motions filed by the parties after the record has been certified to the Board of Directors; exceptions and requests for oral argument; and any other papers required to be filed with the Board of Directors under this part.

§ 308.105 Custodian of the record.

The Administrative Officer is the official custodian of the record when no ALJ has jurisdiction over the proceeding. The Administrative Officer will maintain the official record of all papers filed in each proceeding.

§ 308.106 Written testimony in lieu of oral hearing.

(a) *General rule.* (1) At any time more than 15 days before the hearing is to commence, on the motion of any party or on the ALJ's own motion, the ALJ may order that the parties present part or all of their case-in-chief and, if ordered, their rebuttal, in the form of exhibits and written statements sworn to by the witness offering such statements as evidence, provided that if any party objects, the ALJ will not require such a format if that format would violate the objecting party's right under the Administrative Procedure Act, or other applicable law, or would otherwise unfairly prejudice that party.

(2) Any such order will provide that each party must, upon request, have the same right of oral cross-examination (or redirect examination) as would exist had the witness testified orally rather than through a written statement. Such order must also provide that any party has a right to call any hostile witness or adverse party to testify orally.

(b) *Scheduling of submission of written testimony.* (1) If written direct testimony and exhibits are ordered under paragraph (a) of this section, the ALJ will require that it be filed within the time period for commencement of the hearing, and the hearing will be deemed to have commenced on the day such testimony is due.

(2) Absent good cause shown, written rebuttal, if any, must be submitted and the oral portion of the hearing begun within 30 days of the date set for filing written direct testimony.

(3) The ALJ will direct, unless good cause requires otherwise, that—

(i) All parties must simultaneously file any exhibits and written direct testimony required under paragraph (b)(1) of this section; and

(ii) All parties must simultaneously file any exhibits and written rebuttal required under paragraph (b)(2) of this section.

(c) *Failure to comply with order to file written testimony.* (1) The failure of any party to comply with an order to file written testimony or exhibits at the time and in the matter required under this section will be deemed a waiver of that party's right to present any evidence,

except testimony of a previously identified adverse party or hostile witness. Failure to file written testimony or exhibits is, however, not a waiver of that party's right of cross-examination or a waiver of the right to present rebuttal evidence that was not required to be submitted in written form.

(2) Late filings of papers under this section may be allowed and accepted only upon good cause shown.

§ 308.107 Supplemental discovery rules.

(a) *Scope of discovery.* Subject to the limitations set out in § 308.24, a party may obtain discovery regarding any non-privileged matter that has material relevance to the merits of the pending action, and is proportional to the needs of the action, considering the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Parties may obtain discovery only through the production of documents and depositions, as set forth in the Uniform Rules and the Local Rules.

(b) *Joint Discovery Plan.* Within the time period set by the ALJ and prior to serving any discovery requests, the parties must meet and confer to consider the discovery needed to support their claims and defenses and discuss any issues about preserving discoverable information.

(1) At the meet and confer, the parties must use reasonable efforts to develop a Joint Discovery Plan that should contain the following elements:

(i) The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to, or focused on, particular issues;

(ii) Any issues about disclosure, discovery, or preservation of electronically stored information (ESI), including the form or forms in which it should be produced;

(iii) Provisions regarding any anticipated discovery of nonparties;

(iv) Whether depositions are anticipated and the appropriate limits on the taking of such depositions, consistent with paragraph (e)(1) of this section, including the maximum number of depositions to be allowed;

(v) The anticipated timing of the production of any document identifying and describing privileged documents that a party intends to redact or withhold from production; and

(vi) Provisions regarding any inadvertent disclosure of privileged information.

(2) The Joint Discovery Plan must comply with the provisions of this section and § 308.24.

(3) The parties must submit their proposed Joint Discovery Plan to the ALJ for review, modification, and/or approval. In the event the parties cannot agree to some or all of the provisions, the parties must file their respective proposals with the ALJ for resolution. After review, the ALJ must issue an approved Joint Discovery Plan, which must include any modifications made by the ALJ.

(c) *Document and electronically stored information (ESI) discovery*—(1) *Scope of document discovery.* Parties to proceedings set forth at § 308.1 and as provided in the Local Rules may obtain discovery through the production of documents and ESI.

(2) *Depositions to determine completeness of document production.* Any counsel is permitted to depose a person producing documents or ESI pursuant to a document subpoena on the strictly limited topics of the identification of documents and ESI produced by that person, and a reasonable examination to determine whether the subpoenaed person made an adequate search for, and has produced, all subpoenaed documents and ESI.

(3) *Specific limitations on ESI discovery.* A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the ALJ may nonetheless order discovery from such sources if the requesting party shows good cause. The ALJ may specify conditions for the discovery.

(4) *Request for production.* Consistent with the Joint Discovery Plan, a party may serve on any other party a request to produce documents, and permit the requesting party or its representative to inspect, copy, test, or sample documents in the responding party's possession, custody, or control.

(5) *Privilege.* Consistent with § 308.25(e) and the Joint Discovery Plan, and prior to the close of the discovery period set by the ALJ, the producing party must reasonably identify all documents withheld or redacted on the grounds of privilege and must produce a statement of the basis for the assertion of privilege.

(6) *Document subpoenas to nonparties.* (i) The provisions of § 308.26 apply to document subpoenas to nonparties. Any requests for nonparty subpoenas must comply with § 308.24(b) and the Joint Discovery Plan.

(ii) If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that it does not otherwise comply with § 308.24(b) or the Joint Discovery Plan, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules and the Local Rules.

(d) *Expert witness disclosures.* (1) *Required elements.* When expert witness disclosures are required, the disclosures must include: name, mailing address, and electronic mail address of each expert witness:

(i) If the expert is one retained or specially employed to provide expert testimony in the matter, or one whose duties as the party's employee regularly involve giving expert testimony, the witness must provide a written report in compliance with paragraph (d)(2)(i) of this section.

(ii) If the expert is an employee of a party who does not regularly provide expert testimony, including a commissioned bank examiner employed by the FDIC, the witness must provide written disclosures in compliance with paragraph (d)(2)(ii) of this section.

(2) *Disclosure of expert testimony*—(i) *Witnesses* who *must provide written report.* Unless otherwise stipulated or ordered by the ALJ, experts described in paragraph (d)(1)(i) of this section must prepare a signed expert report that contains:

(A) A complete statement of all opinions the witness will express and the basis and reasons for them;

(B) The facts or data considered by the witness in forming the opinions;

(C) Any exhibits that will be used to summarize or support the opinions;

(D) The witness' qualifications, including a list of all publications authored in the previous 10 years;

(E) A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(F) A statement of the compensation to be paid for the study and testimony in the case.

(ii) *Witnesses who provide written disclosures instead of a written report.* Unless otherwise stipulated or ordered by the ALJ, expert witnesses described in paragraph (d)(1)(ii) of this section are not required to provide a written report, but must provide written disclosures that state:

(A) The subject matter on which the witness is expected to present evidence; and

(B) A summary of the facts and opinions to which the witness is expected to testify.

(e) *Depositions*—(1) *In general.* In addition to paragraph (c)(2) of this section, and subject to the provisions of § 308.24 and paragraph (a) of this section, a party may take depositions of individuals with direct knowledge of facts relevant to the proceeding and individuals designated as an expert under paragraph (d)(1) of this section, where the evidence sought cannot be obtained from some other source that is more convenient, less burdensome, or less expensive. Absent exceptional circumstances, depositions will only be permitted of individuals expected to testify at the hearing, including experts.

(i) *Limits on depositions.* Unless otherwise stipulated by the parties, depositions are only permitted to the extent ordered by the ALJ upon a showing of good cause.

(ii) *Privileged matters.* Privileged matters are not discoverable by deposition. Privileges include those set forth in § 308.24(c).

(iii) *Report.* A party must produce any disclosure required by paragraph (d)(2) of this section before the deposition of the witness required to provide such disclosure. Unless otherwise provided by the ALJ, the party must produce this report at least 20 days prior to any deposition of the witness.

(2) *Notice.* A party desiring to take a deposition must give reasonable notice in writing to the deponent and to every other party to the proceeding. The notice must state the time, manner, and place for taking the deposition, and the name and address of the person to be deposed.

(i) *Location.* A deposition notice may require the witness to be deposed at any place within a State, territory, or possession of the United States or the District of Columbia in which that witness resides or has a regular place of employment, or such other convenient place as agreed by the parties and the witness.

(ii) *Remote participation.* The parties may stipulate, or the ALJ may order, that a deposition be taken by telephone or other remote means.

(iii) *Deposition subpoenas.* A deponent's attendance may be compelled by subpoena.

(A) *Issuance.* At the request of a party, the ALJ will issue a subpoena requiring the attendance of a witness at a deposition under this paragraph (e) unless the ALJ determines that the requested subpoena is outside the scope of paragraph (e)(1) of this section.

(B) *Service.* The party requesting the subpoena must serve it on the person named therein, or on that person's counsel, by any of the methods identified in § 308.11(d). The party serving the subpoena must file proof of service with the ALJ, unless the ALJ issues an order indicating the filing of proof of service is not required.

(C) *Objection to deposition subpoena.* A motion to modify or quash a deposition subpoena must be in accordance with the procedures of § 308.27(b).

(D) *Enforcement of deposition subpoena.* Enforcement of a deposition subpoena must be in accordance with the procedures of § 308.27(c)(2) and (d).

(3) *Time for taking depositions.* A party may take depositions at any time after the issuance of the approved Joint Discovery Plan, but no later than 20 days before the scheduled hearing date, except with permission of the ALJ for good cause shown.

(4) *Conduct of the deposition.* The witness must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Unless the parties otherwise agree, all objections to questions or exhibits must be in short form and must state the grounds for the objection. Failure to object to questions or exhibits is not a waiver except when the grounds for the objection might have been avoided if the objection had been timely presented.

(5) *Duration.* Unless otherwise stipulated by the parties or ordered by the ALJ, a deposition is limited to 1 day of 7 hours. The ALJ may, when it is consistent with § 308.24 and paragraph (a) of this section, order additional time if it is necessary to fairly examine the witness, including when any person or circumstance has impeded the examination.

(6) *Recording the testimony*—(i) *Generally.* The party taking the deposition must have a certified court reporter record the witness' testimony:

(A) By stenotype machine or electronic means, such as by sound or video recording device;

(B) Upon agreement of the parties, by any other method; or

(C) For good cause and with leave of the ALJ, by any other method.

(ii) *Cost.* The party taking the deposition must bear the cost of recording and transcribing the witness' testimony.

(iii) *Transcript.* The court reporter must provide a transcript of the witness' testimony to the party taking the deposition and must make a copy of the transcript available to each party upon payment by that party of the cost of the copy. The transcript must be subscribed or certified in accordance with § 308.27(c)(3).

(f) *Discovery motions*—(1) *Motions to limit discovery.* In addition to § 308.25(d), upon a motion by a party or on the ALJ's own motion, the ALJ must limit the frequency or extent of discovery otherwise allowed by this subpart if the ALJ determines that:

(i) The discovery sought is unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) Involves privileged, irrelevant, or immaterial matters;

(iii) The party seeking discovery has already had ample opportunity to obtain the information by discovery in the action; or

(iv) The proposed discovery is outside the scope of this section or § 308.24.

(2) *Motions to terminate depositions.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. Upon such a motion, the ALJ may order that the deposition be terminated or may limit its scope and manner. If terminated, the deposition may be resumed only by order of the ALJ.

(3) *Motions to compel discovery.* The provisions of § 308.25(f) apply to any motion to compel discovery.

■ 25. Appendix A, is added to read as follows:

Appendix A to Part 308—Rules of Practice and Procedure

Note: This appendix is effective for all adjudicatory proceedings initiated prior to April 1, 2024. Cross-references to 12 CFR part 308 (as well as to included sections) in this appendix are to those provisions as contained within this appendix.

Subpart A—Uniform Rules of Practice and Procedure.

§ 308.1 Scope.

This subpart prescribes rules of practice and procedure applicable to adjudicatory proceedings as to which hearings on the record are provided for by the following statutory provisions:

(a) Cease-and-desist proceedings under section 8(b) of the Federal

Deposit Insurance Act (''FDIA'') (12 U.S.C. 1818(b));

(b) Removal and prohibition proceedings under section 8(e) of the FDIA (12 U.S.C. 1818(e));

(c) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) to determine whether the Federal Deposit Insurance Corporation (''FDIC''), should issue an order to approve or disapprove a person's proposed acquisition of an institution and/or institution holding company;

(d) Proceedings under section 15C(c)(2) of the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78o–5), to impose sanctions upon any government securities broker or dealer or upon any person associated or seeking to become associated with a government securities broker or dealer for which the FDIC is the appropriate regulatory agency;

(e) Assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of:

(1) Sections 22(h) and 23 of the Federal Reserve Act (FRA), or any regulation issued thereunder, and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1828(j) or 12 U.S.C. 1468;

(2) Section 106(b) of the Bank Holding Company Act Amendments of 1970 (''BHCA Amendments of 1970''), and certain unsafe or unsound practices or breaches of fiduciary duty, pursuant to 12 U.S.C. 1972(2)(F);

(3) Any provision of the Change in Bank Control Act of 1978, as amended (the ''CBCA''), or any regulation or order issued thereunder, and certain unsafe or unsound practices, or breaches of fiduciary duty, pursuant to 12 U.S.C. 1817(j)(16);

(4) Section 7(a)(1) of the FDIA, pursuant to 12 U.S.C. 1817(a)(1);

(5) Any provision of the International Lending Supervision Act of 1983 (''ILSA''), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3909;

(6) Any provision of the International Banking Act of 1978 (''IBA''), or any rule, regulation or order issued thereunder, pursuant to 12 U.S.C. 3108;

(7) Certain provisions of the Exchange Act, pursuant to section 21B of the Exchange Act (15 U.S.C. 78u–2);

(8) Section 1120 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (''FIRREA'') (12 U.S.C. 3349), or any order or regulation issued thereunder;

(9) The terms of any final or temporary order issued under section 8 of the FDIA or of any written agreement executed by the FDIC or the former Office of Thrift Supervision (OTS), the terms of any condition imposed in writing by the FDIC in connection with the grant of an application or request, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided herein pursuant to 12 U.S.C. 1818(i)(2);

(10) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder; and

(11) Any provision of law referenced in 31 U.S.C. 5321 or any order or regulation issued thereunder;

(12) Certain provisions of Section 5 of the Home Owners' Loan Act (HOLA) or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1464(d)(1), (5)–(8), (s), and (v);

(13) Section 9 of the HOLA or any regulation or order issued thereunder, pursuant to 12 U.S.C. 1467(d);

(14) Section 10 of HOLA, pursuant to 12 U.S.C. 1467a(a)(2)(D), (g), (i)(2)–(4) and (r); and

(f) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g));

(g) Proceedings under section 10(k) of the FDIA (12 U.S.C. 1820(k)) to impose penalties for violations of the post-employment restrictions under that subsection; and

(h) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in the Local Rules.

§ 308.2 Rules of construction.

For purposes of this subpart:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate;

(c) The term *counsel* includes a non-attorney representative; and

(d) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 308.3 Definitions.

For purposes of this subpart, unless explicitly stated to the contrary:

Administrative law judge means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

Administrative Officer means an inferior officer of the Federal Deposit Insurance Corporation, duly appointed by the Board of Directors of the Federal Deposit Insurance Corporation to serve as the Board's designee to hear certain motions or requests in an adjudicatory proceeding and to be the official custodian of the record for the Federal Deposit Insurance Corporation.

Adjudicatory proceeding means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

Assistant Administrative Officer means an inferior officer of the Federal Deposit Insurance Corporation, duly appointed by the Board of Directors of the Federal Deposit Insurance Corporation to serve as the Board's designee to hear certain motions or requests in an adjudicatory proceeding upon the designation or unavailability of the Administrative Officer.

Board of Directors or *Board* means the Board of Directors of the Federal Deposit Insurance Corporation or its designee.

Decisional employee means any member of the Federal Deposit Insurance Corporation's or administrative law judge's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Board of Directors, the administrative law judge, or the Administrative Officer, or the Assistant Administrative Officer, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

Designee of the Board of Directors means officers or officials of the Federal Deposit Insurance Corporation acting pursuant to authority delegated by the Board of Directors.

Enforcement Counsel means any individual who files a notice of appearance as counsel on behalf of the FDIC in an adjudicatory proceeding.

FDIC means the Federal Deposit Insurance Corporation.

Final order means an order issued by the FDIC with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

Institution includes:

(1) Any bank as that term is defined in section 3(a) of the FDIA (12 U.S.C. 1813(a));

(2) Any bank holding company or any subsidiary (other than a bank) of a bank holding company as those terms are defined in the BHCA (12 U.S.C. 1841 *et seq.*);

(3) Any savings association as that term is defined in section 3(b) of the FDIA (12 U.S.C. 1813(b)), any savings and loan holding company or any subsidiary thereof (other than a bank) as those terms are defined in section 10(a) of the HOLA (12 U.S.C. 1467a(a));

(4) Any organization operating under section 25 of the FRA (12 U.S.C. 601 *et seq.*);

(5) Any foreign bank or company to which section 8 of the IBA (12 U.S.C. 3106), applies or any subsidiary (other than a bank) thereof; and

(6) Any federal agency as that term is defined in section 1(b) of the IBA (12 U.S.C. 3101(5)).

Investigation means any investigation conducted pursuant to section 10(c) of the FDIA or pursuant to section 5(d)(1)(B) of HOLA (12 U.S.C. 1464(d)(1)(B)).

Local Rules means those rules promulgated by the FDIC in those subparts of this part other than subpart A.

Office of Financial Institution Adjudication (OFIA) means the executive body charged with overseeing the administration of administrative enforcement proceedings of the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve Board (FRB), the FDIC, and the National Credit Union Administration (NCUA).

Party means the FDIC and any person named as a party in any notice.

Person means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in this section.

Respondent means any party other than the FDIC.

Uniform Rules means those rules in subpart A of this part that pertain to the types of formal administrative enforcement actions set forth at § 308.1 and as specified in subparts B through P of this part.

Violation includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

§ 308.4 Authority of Board of Directors.

The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.

§ 308.5 Authority of the administrative law judge.

(a) *General rule.* All proceedings governed by this part shall be conducted in accordance with the provisions of chapter 5 of title 5 of the United States Code. The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The administrative law judge shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas duces tecum, and protective orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 308.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the Board of Directors shall have the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the Board of Directors a recommended decision as provided herein;

(9) To recuse himself or herself by motion made by a party or on his or her own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 308.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the FDIC or an administrative law judge*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the FDIC if such attorney is not currently suspended or debarred from practice before the FDIC.

(2) *By non-attorneys.* An individual may appear on his or her own behalf; a member of a partnership may represent the partnership; a duly authorized officer, director, or employee of any government unit, agency, institution, corporation or authority may represent that unit, agency, institution, corporation or authority if such officer; director, or employee is not currently suspended or debarred from practice before the FDIC.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the FDIC, shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the administrative law judge, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 308.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice shall be signed by at least one counsel of record in his or her individual name and shall state that counsel's address and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address and telephone number on every filing or submission of record.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: The counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or

needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the administrative law judge shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 308.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The administrative law judge may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 308.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 308.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the FDIC (including such person's counsel); and

(ii) The administrative law judge handling that proceeding, the Board of Directors, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the FDIC until the date that the Board of Directors issues its final decision pursuant to § 308.40(c):

(1) No interested person outside the FDIC shall make or knowingly cause to be made an ex parte communication to any member of the Board of Directors, the administrative law judge, or a decisional employee; and

(2) No member of the Board of Directors, no administrative law judge, or decisional employee shall make or knowingly cause to be made to any interested person outside the FDIC any ex parte communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication is received by the administrative law judge, any member of the Board of Directors or other person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication, to file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The administrative law judge or the Board of Directors shall then determine whether any action should be taken concerning the ex parte communication in accordance with paragraph (d) of this section.

(d) *Sanctions.* Any party or his or her counsel who makes a prohibited ex parte communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the Board of Directors or the administrative law judge including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions.* Except to the extent required for the disposition of ex parte matters as authorized by law, the administrative law judge may not consult a person or party on any matter relevant to the merits of the adjudication, unless on notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the FDIC in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 308.40 except as witness or counsel in public proceedings.

§ 308.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 308.25 and 308.26, shall be filed with the OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the Board of Directors or the administrative law judge, filing may be accomplished by:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if expressly authorized, and upon any conditions specified, by the Board of Directors or the administrative law judge. All papers filed by electronic media shall also concurrently be filed in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on 81–2 × 11 inch paper, and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 308.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the FDIC and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Board of Directors, or the administrative law judge, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

§ 308.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers shall serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Delivering the papers to a reliable commercial courier service, overnight delivery service, or to the U.S. Post Office for Express Mail delivery;

(3) Mailing the papers by first class, registered, or certified mail; or

(4) Transmission by electronic media, only if the parties mutually agree. Any papers served by electronic media shall also concurrently be served in accordance with the requirements of § 308.10(c).

(c) *By the Board of Directors.* (1) All papers required to be served by the Board of Directors or the administrative law judge upon a party who has appeared in the proceeding in accordance with § 308.6, shall be served by any means specified in paragraph (b) of this section.

(2) If a party has not appeared in the proceeding in accordance with § 308.6, the Board of Directors or the administrative law judge shall make service by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the party's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) By delivery to an agent which, in the case of a corporation or other association, is delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) In such other manner as is reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service shall be made on at least one branch or agency so involved.

§ 308.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of personal service or same day commercial courier delivery, upon actual service;

(ii) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing, and as agreed among the parties, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Board of Directors or administrative law judge in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic media transmission, add one calendar day to the prescribed period, unless otherwise determined by the Board of Directors or the administrative law judge in the case of filing, or by agreement among the parties in the case of service.

§ 308.13 Change of time limits.

Except as otherwise provided by law, the administrative law judge may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the Board of Directors pursuant to § 308.38, the Board of Directors may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party or of the Board of Directors after notice and opportunity to respond is afforded all non-moving parties, or on the administrative law judge's own motion.

§ 308.14 Witness fees and expenses.

Witnesses subpoenaed for testimony or depositions shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the FDIC is the party requesting the subpoena. The FDIC shall not be required to pay any fees to, or expenses of, any witness not subpoenaed by the FDIC.

§ 308.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to

Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any FDIC representative other than Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 308.16 FDIC's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the FDIC to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the FDIC to conduct or continue any form of investigation authorized by law.

§ 308.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 308.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1)(i) Except for change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), a proceeding governed by this subpart is commenced by issuance of a notice by the FDIC.

(ii) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law.

(iii) The notice must be filed with the OFIA.

(2) Change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)) commence with the issuance of an order by the FDIC.

(b) *Contents of notice.* The notice must set forth:

(1) The legal authority for the proceeding and for the FDIC's jurisdiction over the proceeding;

(2) A statement of the matters of fact or law showing that the FDIC is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing shall be filed with OFIA.

§ 308.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent shall file an answer as designated in the notice. In a civil money penalty proceeding, respondent shall also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer must be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the administrative law judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Board of Directors based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order.

§ 308.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the Board of Directors or administrative law judge orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the administrative law judge may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the administrative law judge that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 308.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the administrative law judge shall file with the Board of Directors a recommended decision containing the findings and the relief sought in the notice.

§ 308.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the administrative law judge's own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such

consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The administrative law judge may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the administrative law judge finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 308.23 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the administrative law judge. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the administrative law judge directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the administrative law judge, except that following the filing of the recommended decision, motions must be filed with the Administrative Officer for disposition by the Board of Directors.

(d) *Responses.* (1) Except as otherwise provided in this paragraph (d), within ten days after service of any written motion, or within such other period of time as may be established by the administrative law judge or the Administrative Officer, any party may file a written response to a motion. The administrative law judge shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 308.29 and 308.30.

§ 308.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term ''documents'' may be defined to include drawings, graphs, charts, photographs, recordings, data stored in electronic form, and other data compilations from which information can be obtained, or translated, if necessary, by the parties through detection devices into reasonably usable form, as well as written material of all kinds.

(2) Discovery by use of deposition is governed by subpart I of this part.

(3) Discovery by use of interrogatories is not permitted.

(b) *Relevance.* A party may obtain document discovery regarding any matter, not privileged, that has material relevance to the merits of the pending action. Any request to produce documents that calls for irrelevant material, that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, the time provided to respond in the request is inadequate, or the request calls for copies of documents to be delivered to the requesting party and fails to include the requestor's written agreement to pay in advance for the copying, in accordance with § 308.25.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative-process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All discovery, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the hearing. No exceptions to this time limit shall be permitted, unless the administrative law judge finds on the record that good cause exists for waiving the requirements of this paragraph.

§ 308.25 Request for document discovery from parties.

(a) *General rule.* Any party may serve on any other party a request to produce for inspection any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. The request must identify the documents to be produced either by individual item or by category, and must describe each item and category with reasonable particularity. Documents must be produced as they are kept in the usual course of business or must be organized to correspond with the categories in the request.

(b) *Production or copying.* The request must specify a reasonable time, place, and manner for production and performing any related acts. In lieu of inspecting the documents, the requesting party may specify that all or some of the responsive documents be copied and the copies delivered to the requesting party. If copying of fewer than 250 pages is requested, the party to whom the request is addressed shall bear the cost of copying and shipping charges. If a party requests 250 pages or more of copying, the requesting party shall pay for the copying and shipping charges. Copying charges are the current per page copying rate imposed by 12 CFR part 309 implementing the Freedom of Information Act (5 U.S.C. 552). The party to whom the request is addressed may require payment in advance before producing the documents.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns that:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request may, within ten days of being served with such request, file a motion in accordance with the provisions of § 308.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to shall be specified. Any objections not made in

accordance with this paragraph and § 308.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within five days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by deliberative process, attorney-work-product, or attorney-client privilege are voluminous, these documents may be identified by category instead of by individual document. The administrative law judge retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 308.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the request may file a written response to a motion to compel within five days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the administrative law judge shall rule promptly on all motions filed pursuant to this section. If the administrative law judge determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, he or she may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the administrative law judge. Notwithstanding any other provision in this part, the administrative law judge may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the administrative law judge its intention to file a timely motion for interlocutory review of the administrative law judge's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the administrative law judge issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the administrative law judge against a party who fails to produce subpoenaed documents.

§ 308.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the administrative law judge for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party shall specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party shall only apply for a document subpoena under this section within the time period during which such party could serve a discovery request under § 308.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The administrative law judge shall promptly issue any document subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant shall serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 308.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the administrative law judge has not quashed or modified. A party's right to seek court enforcement of a document subpoena shall in no way limit the sanctions that may be imposed by the administrative law judge on a party who induces a failure to comply with subpoenas issued under this section.

§ 308.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the administrative law judge for the issuance of a subpoena, including a subpoena duces tecum, requiring the attendance of the witness at a deposition. The administrative law judge may issue a deposition subpoena under this section upon showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition.

A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment or such other convenient place as the administrative law judge shall fix.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the administrative law judge on his or her own motion, requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the administrative law judge orders otherwise, no deposition under this section shall be taken on fewer than ten days' notice to the witness and all parties. Deposition subpoenas may be served in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the administrative law judge to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the administrative law judge for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any order of the administrative law judge which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(3) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the administrative law judge has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the administrative law judge on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 308.28 Interlocutory review.

(a) *General rule.* The Board of Directors may review a ruling of the administrative law judge prior to the certification of the record to the Board of Directors only in accordance with the procedures set forth in this section and § 308.23.

(b) *Scope of review.* The Board of Directors may exercise interlocutory review of a ruling of, the administrative law judge if the Board of Directors finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review shall be filed by a party with the administrative law judge within ten days of his or her ruling and shall otherwise comply with § 308.23. Any party may file a response to a request for interlocutory review in accordance with § 308.23(d). Upon the expiration of the time for filing all responses, the administrative law judge shall refer the matter to the Board of Directors for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Board of Directors under this section suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Board of Directors.

§ 308.29 Summary disposition.

(a) *In general.* The administrative law judge shall recommend that the Board of Directors issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes that there is no genuine issue of material fact to be determined and that he or she is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the administrative law judge, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the administrative law judge may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the administrative law judge shall determine whether the moving party is entitled to summary disposition. If the administrative law judge determines that summary disposition is warranted, the administrative law judge shall submit a recommended decision to that effect to the Board of Directors. If the administrative law judge finds that no party is entitled to summary disposition, he or she shall make a ruling denying the motion.

§ 308.30 Partial summary disposition.

If the administrative law judge determines that a party is entitled to summary disposition as to certain claims only, he or she shall defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the administrative law judge has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 308.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding or such other time as parties may agree, the administrative law judge shall direct counsel for all parties to meet with him or her in person at a specified time and place prior to the hearing or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a ''scheduling conference.'' The identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The administrative law judge may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The administrative law judge, in his or her discretion, may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the administrative law judge shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 308.32 Prehearing submissions.

(a) Within the time set by the administrative law judge, but in no case later than 14 days before the start of the hearing, each party shall serve on every other party, his or her:

(1) Prehearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) Effect of failure to comply. No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 308.33 Public hearings.

(a) *General rule.* All hearings shall be open to the public, unless the FDIC, in its discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice or, in the case of change-in-control proceedings under section 7(j)(4) of the FDIA (12 U.S.C. 1817(j)(4)), within 20 days from service of the hearing order, any respondent may file with the Administrative Officer a request for a private hearing, and any party may file a reply to such a request. A party must serve on the administrative law judge a copy of any request or reply the party files with the Administrative Officer. The form of, and procedure for, these requests and replies are governed by § 308.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 308.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the administrative law judge may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the administrative law judge.

(3) The administrative law judge shall promptly issue any hearing subpoena requested pursuant to this section. If the administrative law judge determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the administrative law judge, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but not more than ten days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the administrative law judge which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 308.26(c).

§ 308.35 Conduct of hearings.

(a) *General rules.* (1) Hearings shall be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel shall present its case-in-chief first, unless otherwise ordered by the administrative law judge, or unless otherwise expressly specified by law or regulation. Enforcement Counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree the administrative law judge shall fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the administrative law judge may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the administrative law judge directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The administrative law judge may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the administrative law judge's own motion.

§ 308.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or state government agency.

(2) All matters officially noticed by the administrative law judge or Board of Directors shall appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by an appropriate Federal financial institution regulatory agency or state regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the administrative law judge's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness, either by representation of counsel or by direct interrogation of the witness.

(3) The administrative law judge shall retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the Board of Directors.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing, and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the administrative law judge may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 308.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the administrative law judge shall serve notice upon each party, that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the administrative law judge

proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the administrative law judge or within such longer period as may be ordered by the administrative law judge.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The administrative law judge shall not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 308.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 308.37(b), the administrative law judge shall file with and certify to the Administrative Officer, for decision, the record of the proceeding. The record must include the administrative law judge's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The administrative law judge shall serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the administrative law judge files with and certifies to the Administrative Officer for final determination the record of the proceeding, the administrative law judge shall furnish to the Administrative Officer a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the administrative law judge in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: Each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 308.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 308.38, a party may file with the Administrative Officer written exceptions to the administrative law judge's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the administrative law judge to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Board of Directors if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the administrative law judge's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 308.40 Review by Board of Directors.

(a) *Notice of submission to Board of Directors.* When the Administrative Officer determines that the record in the proceeding is complete, the Administrative Officer shall serve notice upon the parties that the proceeding has been submitted to the Board of Directors for final decision.

(b) *Oral argument before the Board of Directors.* Upon the initiative of the Board of Directors or on the written request of any party filed with the Administrative Officer within the time for filing exceptions, the Board of Directors may order and hear oral argument on the recommended findings, conclusions, decision, and order of the administrative law judge. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Board of Directors' final decision. Oral argument before the Board of Directors must be on the record.

(c) *Final decision.* (1) Decisional employees may advise and assist the Board of Directors in the consideration and disposition of the case. The final decision of the Board of Directors will be based upon review of the entire record of the proceeding, except that the Board of Directors may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Board of Directors shall render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the Board of Directors orders that the action or any aspect thereof be remanded to the administrative law judge for further proceedings. Copies of the final decision and order of the Board of Directors shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Board of Directors or required by statute, upon any appropriate state or Federal supervisory authority.

§ 308.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the FDIC may not, unless specifically ordered by the Board of Directors or a reviewing court, operate as a stay of any order issued by the FDIC. The Board of Directors may, in its discretion, and on such terms as it finds just, stay the effectiveness of all or any

part of its order pending a final decision on a petition for review of that order.

Subpart B—General Rules of Procedure

§ 308.101 Scope of Local Rules.

(a) Subparts B and C of the Local Rules prescribe rules of practice and procedure to be followed in the administrative enforcement proceedings initiated by the FDIC as set forth in § 308.1 of the Uniform Rules.

(b) Except as otherwise specifically provided, the Uniform Rules and subpart B of the Local Rules shall not apply to subparts D through T of the Local Rules.

(c) Subpart C of the Local Rules shall apply to any administrative proceeding initiated by the FDIC.

(d) Subparts A, B, and C of this part prescribe the rules of practice and procedure to applicable to adjudicatory proceedings as to which hearings on the record are provided for by the assessment of civil money penalties by the FDIC against institutions, institution-affiliated parties, and certain other persons for which it is the appropriate regulatory agency for any violation of section 15(c)(4) of the Exchange Act (15 U.S.C. 78o(c)(4)).

§ 308.102 Authority of Board of Directors and Administrative Officer.

(a) *The Board of Directors.* (1) The Board of Directors may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the Administrative Officer.

(2) Nothing contained in this part shall be construed to limit the power of the Board of Directors granted by applicable statutes or regulations.

(b) *The Administrative Officer.* (1) When no administrative law judge has jurisdiction over a proceeding, the Administrative Officer may act in place of, and with the same authority as, an administrative law judge, except that the Administrative Officer may not hear a case on the merits or make a recommended decision on the merits to the Board of Directors.

(2) Pursuant to authority delegated by the Board of Directors, the Administrative Officer and Assistant Administrative Officer, upon the advice and recommendation of the Deputy General Counsel for Litigation or, in his absence, the Assistant General Counsel for General Litigation, may issue rulings in proceedings under sections 7(j), 8, 18(j), 19, 32 and 38 of the FDIA (12 U.S.C. 1817(j), 1818, 1828(j), 1829, 1831i and 1831*o*) concerning:

(i) Denials of requests for private hearing;

(ii) Interlocutory appeals;

(iii) Stays pending judicial review;

(iv) Reopenings of the record and/or remands of the record to the ALJ;

(v) Supplementation of the evidence in the record;

(vi) All remands from the courts of appeals not involving substantive issues;

(vii) Extensions of stays of orders terminating deposit insurance; and

(viii) All matters, including final decisions, in proceedings under section 8(g) of the FDIA (12 U.S.C. 1818(g)).

§ 308.103 Appointment of administrative law judge.

(a) *Appointment.* Unless otherwise directed by the Board of Directors or as otherwise provided in the Local Rules, a hearing within the scope of this part 308 shall be held before an administrative law judge of the Office of Financial Institution Adjudication (''OFIA'').

(b) *Procedures.* (1) The Enforcement Counsel shall promptly after issuance of the notice file the matter with the Office of Financial Institution Adjudication (''OFIA'') which shall secure the appointment of an administrative law judge to hear the proceeding.

(2) OFIA shall advise the parties, in writing, that an administrative law judge has been appointed.

§ 308.104 Filings with the Board of Directors.

(a) *General rule.* All materials required to be filed with or referred to the Board of Directors in any proceedings under this part shall be filed with the Administrative Officer, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

(b) *Scope.* Filings to be made with the Administrative Officer include pleadings and motions filed during the proceeding; the record filed by the administrative law judge after the issuance of a recommended decision; the recommended decision filed by the administrative law judge following a motion for summary disposition; referrals by the administrative law judge of motions for interlocutory review; motions and responses to motions filed by the parties after the record has been certified to the Board of Directors; exceptions and requests for oral argument; and any other papers required to be filed with the Board of Directors under this part.

§ 308.105 Custodian of the record.

The Administrative Officer is the official custodian of the record when no administrative law judge has jurisdiction over the proceeding. As the official custodian, the Administrative Officer shall maintain the official record of all papers filed in each proceeding.

§ 308.106 Written testimony in lieu of oral hearing.

(a) *General rule.* (1) At any time more than fifteen days before the hearing is to commence, on the motion of any party or on his or her own motion, the administrative law judge may order that the parties present part or all of their case-in-chief and, if ordered, their rebuttal, in the form of exhibits and written statements sworn to by the witness offering such statements as evidence, provided that if any party objects, the administrative law judge shall not require such a format if that format would violate the objecting party's right under the Administrative Procedure Act, or other applicable law, or would otherwise unfairly prejudice that party.

(2) Any such order shall provide that each party shall, upon request, have the same right of oral cross-examination (or redirect examination) as would exist had the witness testified orally rather than through a written statement. Such order shall also provide that any party has a right to call any hostile witness or adverse party to testify orally.

(b) *Scheduling of submission of written testimony.* (1) If written direct testimony and exhibits are ordered under paragraph (a) of this section, the administrative law judge shall require that it be filed within the time period for commencement of the hearing, and the hearing shall be deemed to have commenced on the day such testimony is due.

(2) Absent good cause shown, written rebuttal, if any, shall be submitted and the oral portion of the hearing begun within 30 days of the date set for filing written direct testimony.

(3) The administrative law judge shall direct, unless good cause requires otherwise, that—

(i) All parties shall simultaneously file any exhibits and written direct testimony required under paragraph (b)(1) of this section; and

(ii) All parties shall simultaneously file any exhibits and written rebuttal required under paragraph (b)(2) of this section.

(c) *Failure to comply with order to file written testimony.* (1) The failure of any party to comply with an order to file written testimony or exhibits at the time and in the manner required under this section shall be deemed a waiver of that party's right to present any evidence, except testimony of a previously

identified adverse party or hostile witness. Failure to file written testimony or exhibits is, however, not a waiver of that party's right of cross-examination or a waiver of the right to present rebuttal evidence that was not required to be submitted in written form.

(2) Late filings of papers under this section may be allowed and accepted only upon good cause shown.

§ 308.107 Document discovery.

(a) Parties to proceedings set forth at § 308.1 of the Uniform Rules and as provided in the Local Rules may obtain discovery only through the production of documents. No other form of discovery shall be allowed.

(b) Any questioning at a deposition of a person producing documents pursuant to a document subpoena shall be strictly limited to the identification of documents produced by that person and a reasonable examination to determine whether the subpoenaed person made an adequate search for, and has produced, all subpoenaed documents.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 747

Authority and Issuance

For the reasons set out in the joint preamble, the NCUA amends 12 CFR part 747 as follows:

PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS

■ 26. The authority citation for part 747 continues to read as follows:

Authority: 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e; 42 U.S.C. 4012a; Pub. L. 101–410; Pub. L. 104–134; Pub. L. 109–351; Pub. L. 114–74.22.

■ 27. Revise § 747.0 to read as follows:

§ 747.0 Scope of this part.

(a) This part describes the various formal and informal adjudicative actions and non-adjudicative proceedings available to the National Credit Union Administration Board (NCUA Board), the grounds for those actions and proceedings, and the procedures used in formal and informal hearings related to each available action. As mandated by section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1818 note) (FIRREA), this part incorporates uniform rules of practice and procedure (Uniform Rules), which govern formal adjudications generally, as well as proceedings involving cease-and-desist actions, assessment of civil money penalties, and removal, prohibition and suspension actions. In addition, the Uniform Rules are incorporated in other subparts of this part that provide for formal adjudications. The administrative actions and proceedings described in this section, as well as the grounds and hearing procedures for each, are controlled by sections 120(b) (except where the Federal credit union is closed due to insolvency), 202(a)(3), and 206 of the Federal Credit Union Act (the Act), 12 U.S.C. 1766(b), 1782(a)(3), and 1786. Should any provision of this part be inconsistent with these or any other provisions of the Act, as amended, the Act shall control. Judicial enforcement of any action or order described in this part, as well as judicial review thereof, shall be as prescribed under the Act (12 U.S.C. 1751 *et seq.*) and the Administrative Procedure Act (5 U.S.C. 500 *et seq.*).

(b) As used in this part, the term ''insured credit union'' means any Federal credit union or any State-chartered credit union insured under subchapter II of the Act, unless the context indicates otherwise.

(c) The Uniform Rules in subpart A apply to adjudicatory proceedings initiated on or after April 1, 2024. Any adjudicatory proceedings initiated before April 1, 2024, continue to be governed by the previous version of the Uniform Rules in 12 CFR part 747, subpart A.

■ 28. Subpart A is revised to read as follows:

Subpart A—Uniform Rules of Practice and Procedure

Sec.

Subpart A—Uniform Rules of Practice and Procedure

§ 747.1 Scope.

This subpart prescribes uniform rules of practice and procedure applicable to adjudicatory proceedings required to be conducted on the record after opportunity for a hearing under the following statutory provisions:

(a) Cease-and-desist proceedings under section 206(e) of the Act (12 U.S.C. 1786(e));

(b) Removal and prohibition proceedings under section 206(g) of the Act (12 U.S.C. 1786(g));

(c) Assessment of civil money penalties by the NCUA Board against institutions and institution-affiliated parties for any violation of:

(1) Section 202 of the Act (12 U.S.C. 1782);

(2) Section 1120 of FIRREA (12 U.S.C. 3349), or any order or regulation issued thereunder;

(3) The terms of any final or temporary order issued under section 206 of the Act or any written agreement executed by the National Credit Union Administration (''NCUA''), any condition imposed in writing by the NCUA in connection with any action on any application, notice, or other request by the credit union or institution-affiliated party, certain unsafe or unsound practices or breaches of fiduciary duty, or any law or regulation not otherwise provided in this section, pursuant to 12 U.S.C. 1786(k);

(4) Any provision of law referenced in section 102(f) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(f)) or any order or regulation issued thereunder;

(d) Remedial action under section 102(g) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(g)); and

(e) This subpart also applies to all other adjudications required by statute to be determined on the record after opportunity for an agency hearing, unless otherwise specifically provided for in subparts B through J of this part.

§ 747.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) The term *counsel* includes a non-attorney representative; and

(c) Unless the context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party.

§ 747.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary:

(a) *Administrative Law Judge (ALJ)* means one who presides at an administrative hearing under authority set forth at 5 U.S.C. 556.

(b) *Adjudicatory proceeding* means a proceeding conducted pursuant to these rules and leading to the formulation of a final order other than a regulation.

(c) *Decisional employee* means any member of the NCUA Board's or ALJ's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the NCUA Board or the ALJ, respectively, in preparing orders, recommended decisions, decisions, and other documents under the Uniform Rules.

(d) *Electronic signature* means affixing the equivalent of a signature to an electronic document filed or transmitted electronically.

(e) *Enforcement Counsel* means any individual who files a notice of appearance as counsel on behalf of the NCUA in an adjudicatory proceeding.

(f) *Final order* means an order issued by the NCUA with or without the consent of the affected institution or the institution-affiliated party, that has become final, without regard to the pendency of any petition for reconsideration or review.

(g) *Institution* includes:

(1) Any Federal credit union as that term is defined in section 101(1) of the Act (12 U.S.C. 1752(1)); and

(2) Any insured State-chartered credit union as that term is defined in section 101(7) of the FCUA (12 U.S.C. 1752(7)).

(h) *Institution-affiliated party* means any institution-affiliated party as that term is defined in section 206(r) of the Act (12 U.S.C. 1786(r)).

(i) *Local Rules* means those rules promulgated by the NCUA in subparts B through I of this part.

(j) *NCUA* means the National Credit Union Administration.

(k) *NCUA Board* means the National Credit Union Administration Board or a person delegated to perform the functions of the NCUA Board.

(l) *OFIA* means the Office of Financial Institution Adjudication, the executive body charged with overseeing the administration of administrative enforcement proceedings for the NCUA, the Board of Governors of the Federal Reserve System (Board of Governors), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC).

(m) *Party* means the NCUA and any person named as a party in any notice.

(n) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, agency, or other entity or organization, including an institution as defined in paragraph (g) of this section.

(o) *Respondent* means any party other than the NCUA.

(p) *Uniform Rules* means those rules in this subpart that are common to the NCUA, the Board of Governors, the FDIC, and the OCC.

(q) *Violation* means any violation as that term is defined in section 3(v) of the Federal Deposit Insurance Act (12 U.S.C. 1813(v)).

§ 747.4 Authority of the NCUA Board.

The NCUA Board may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the ALJ.

§ 747.5 Authority of the administrative law judge (ALJ).

(a) *General rule.* All proceedings governed by this part must be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The ALJ has all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.

(b) *Powers.* The ALJ has all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section, including the following powers:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* protective orders, and other orders, as authorized by this part, and to quash or modify any such subpoenas and orders;

(3) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(4) To take or cause depositions to be taken as authorized by this subpart;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold scheduling and/or pre-hearing conferences as set forth in § 747.31;

(7) To consider and rule upon all procedural and other motions appropriate in an adjudicatory proceeding, provided that only the NCUA Board has the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding;

(8) To prepare and present to the NCUA Board a recommended decision as provided in this subpart;

(9) To recuse oneself by motion made by a party or on the ALJ's own motion;

(10) To establish time, place and manner limitations on the attendance of the public and the media for any public hearing; and

(11) To do all other things necessary and appropriate to discharge the duties of an ALJ.

§ 747.6 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before the NCUA or an ALJ*—(1) *By attorneys.* Any member in good standing of the bar of the highest court of any state, commonwealth, possession, territory of the United States, or the District of Columbia may represent others before the NCUA if such attorney is not currently suspended or debarred from practice before the NCUA.

(2) *By non-attorneys.* An individual may appear on the individual's own behalf.

(3) *Notice of appearance.* (i) Any individual acting on the individual's own behalf or as counsel on behalf of a party, including the NCUA Board, must file a notice of appearance with OFIA at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include:

(A) A written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (2) of this section and is authorized to represent the particular party; and

(B) A written acknowledgement that the individual has reviewed and will comply with the Uniform Rules and Local Rules in this part 747.

(ii) By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the counsel agrees and represents that the counsel is authorized to accept service on behalf of the

represented party and that, in the event of withdrawal from representation, the counsel will, if required by the ALJ, continue to accept service until new counsel has filed a notice of appearance or until the represented party indicates that the party will proceed on a *pro se* basis.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.

§ 747.7 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice must be signed by at least one counsel of record in the counsel's individual name and must state that counsel's mailing address, electronic mail address, and telephone number. A party who acts as the party's own counsel must sign that person's individual name and state that person's mailing address, electronic mail address, and telephone number on every filing or submission of record. Electronic signatures may be used to satisfy the signature requirements of this section.

(b) *Effect of signature.* (1) The signature of counsel or a party will constitute a certification: the counsel or party has read the filing or submission of record; to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the ALJ will strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of the counsel's or party's knowledge, information, and belief formed after reasonable inquiry, the counsel's or party's statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

§ 747.8 Conflicts of interest.

(a) *Conflict of interest in representation.* No person may appear as counsel for another person in an adjudicatory proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The ALJ may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudicatory proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 747.6(a):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 747.9 Ex parte communications.

(a) *Definition*—(1) *Ex parte communications. Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicatory proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside the NCUA (including such person's counsel); and

(ii) The ALJ handling that proceeding, the NCUA Board, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time the notice is issued by the NCUA Board until the date that the NCUA Board issues a final decision pursuant to § 747.40(c):

(1) An interested person outside the NCUA must not make or knowingly cause to be made an *ex parte* communication to the NCUA Board, the ALJ, or a decisional employee; and

(2) The NCUA Board, ALJ, or decisional employee may not make or knowingly cause to be made to any interested person outside the NCUA any *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by the ALJ, the NCUA Board, or any other person identified in paragraph (a) of this section, that person will cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding may, within ten days of service of the *ex parte* communication, file responses thereto and to recommend any sanctions that they believe to be appropriate under the circumstances. The ALJ or the NCUA Board then determines whether any action should be taken concerning the *ex parte* communication in accordance with paragraph (d) of this section.

(d) *Sanctions.* Any party or counsel to a party who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions imposed by the NCUA Board or the ALJ including, but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

(e) *Separation of functions*—(1) *In general.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the ALJ may not:

(i) Consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or

(ii) Be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the NCUA.

(2) *Decision process.* An employee or agent engaged in the performance of investigative or prosecuting functions for the NCUA in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision under § 747.40, except as witness or counsel in administrative or judicial proceedings.

§ 747.10 Filing of papers.

(a) *Filing.* Any papers required to be filed, excluding documents produced in response to a discovery request pursuant to §§ 747.25 and 747.26, must be filed with OFIA, except as otherwise provided.

(b) *Manner of filing.* Unless otherwise specified by the NCUA Board or the ALJ, filing may be accomplished by:

(1) Electronic mail or other electronic means designated by the NCUA Board or the ALJ;

(2) Personal service;

(3) Delivering the papers to a same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *Formal requirements as to papers filed*—(1) *Form.* All papers filed must set forth the name, mailing address, electronic mail address, and telephone number of the counsel or party making the filing and must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced and printed or typewritten on an $8\frac{1}{2} \times 11$ inch page and must be clear and legible.

(2) *Signature.* All papers must be dated and signed as provided in § 747.7.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the name of the NCUA and of the filing party, the title and docket number of the proceeding, and the subject of the particular paper.

§ 747.11 Service of papers.

(a) *By the parties.* Except as otherwise provided, a party filing papers must serve a copy upon the counsel of record for all other parties to the proceeding so represented, and upon any party not so represented.

(b) *Method of service.* Except as provided in paragraphs (c)(2) and (d) of this section, a serving party must use one of the following methods of service:

(1) Electronic mail or other electronic means;

(2) Personal service;

(3) Delivering the papers by same day courier service or overnight delivery service; or

(4) Mailing the papers by first class, registered, or certified mail.

(c) *By the NCUA Board or the ALJ.* (1) All papers required to be served by the NCUA Board or the ALJ upon a party who has appeared in the proceeding in accordance with § 747.6 will be served by electronic mail or other electronic means designated by the NCUA Board or ALJ.

(2) If a respondent has not appeared in the proceeding in accordance with § 747.6, the NCUA Board or the ALJ will serve the respondent by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the respondent;

(iv) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the respondent's last known mailing address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail, delivery by a same day courier service, or by an overnight delivery service to the person's last known mailing address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any state, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any state, territory, possession of the United States, or the District of Columbia, or on any person as otherwise provided by law, is effective without regard to the place where the hearing is held, provided that if service is made on a foreign bank in connection with an action or proceeding involving one or more of its branches or agencies located in any state, territory, possession of the United States, or the District of Columbia, service must be made on at least one branch or agency so involved.

§ 747.12 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this subpart, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays, and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing and service are deemed to be effective:

(i) In the case of transmission by electronic mail or other electronic means, upon transmittal by the serving party;

(ii) In the case of overnight delivery service or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(iii) In the case of personal service or same day courier delivery, upon actual service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the NCUA Board or ALJ in the case of filing or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by electronic mail or other electronic means or by same day courier delivery, add one calendar day to the prescribed period;

(2) If service is made by overnight delivery service, add two calendar days to the prescribed period; or

(3) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period.

§ 747.13 Change of time limits.

Except as otherwise provided by law, the ALJ may, for good cause shown, extend the time limits prescribed by the Uniform Rules or by any notice or order issued in the proceedings. After the referral of the case to the NCUA Board pursuant to § 747.38, the NCUA Board may grant extensions of the time limits for good cause shown. Extensions may be granted at the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the NCUA Board's or the ALJ's own motion.

§ 747.14 Witness fees and expenses.

(a) *In general.* A witness, including an expert witness, who testifies at a deposition or hearing will be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, except as provided in paragraph (b) of this section and unless otherwise waived.

(b) *Exception for testimony by a party.* In the case of testimony by a party, no witness fees or mileage need to be paid. The NCUA will not be required to pay any fees to, or expenses of, any witness not subpoenaed by the NCUA.

(c) *Timing of payment.* Fees and mileage in accordance with this paragraph (c) must be paid in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where the NCUA is the party requesting the subpoena.

§ 747.15 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to Enforcement Counsel written offers or proposals for settlement of a proceeding, without prejudice to the rights of any of the parties. Any such offer or proposal may only be made to Enforcement Counsel. Submission of a written settlement offer does not provide a basis for adjourning or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 747.16 The NCUA's right to conduct examination.

Nothing contained in this subpart limits in any manner the right of the NCUA to conduct any examination, inspection, or visitation of any institution or institution-affiliated party, or the right of the NCUA to conduct or continue any form of investigation authorized by law.

§ 747.17 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding will continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in this subpart will be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 747.18 Commencement of proceeding and contents of notice.

(a) *Commencement of proceeding.* (1) A proceeding governed by this subpart is commenced by issuance of a notice by the NCUA Board.

(2) The notice must be served by Enforcement Counsel upon the respondent and given to any other appropriate financial institution supervisory authority where required by law. Enforcement Counsel may serve the notice upon counsel for the respondent, provided that Enforcement Counsel has confirmed that counsel represents the respondent in the matter and will accept service of the notice on behalf of the respondent.

(3) Enforcement Counsel must file the notice with OFIA.

(b) *Contents of notice.* Notice pleading applies. The notice must provide:

(1) The legal authority for the proceeding and for the NCUA's jurisdiction over the proceeding;

(2) Matters of fact or law showing that the NCUA is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time, place, and nature of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) The time within which to request a hearing as required by law or regulation; and

(7) That the answer and/or request for a hearing must be filed with OFIA.

§ 747.19 Answer.

(a) *When.* Within 20 days of service of the notice, respondent must file an answer as designated in the notice. In a civil money penalty proceeding, respondent must also file a request for a hearing within 20 days of service of the notice.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice and must admit, deny, or state that the respondent lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice which is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief, or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default*—(1) *Effect of failure to answer.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of the respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, Enforcement Counsel may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the ALJ will file with the NCUA Board a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the NCUA Board based upon a respondent's failure to answer is deemed to be an order issued upon consent.

(2) *Effect of failure to request a hearing in civil money penalty proceedings.* If respondent fails to request a hearing as required by law within the time provided, the notice of assessment constitutes a final and unappealable order of the NCUA Board without further action by the ALJ.

§ 747.20 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within ten days after service of the amended notice, whichever period is longer, unless the NCUA Board or ALJ orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the ALJ may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the ALJ that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The ALJ may grant a continuance to enable the objecting party to meet such evidence.

§ 747.21 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized counsel constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further

proceedings or notice to the respondent, the ALJ will file with the NCUA Board a recommended decision containing the findings and the relief sought in the notice.

§ 747.22 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the ALJ's own motion, the ALJ may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence, or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The ALJ may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the ALJ finds:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 747.23 Motions.

(a) *In writing.* (1) Except as otherwise provided in this section, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the ALJ. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record unless the ALJ directs that such motion be reduced to writing.

(c) *Filing of motions.* Motions must be filed with the ALJ, except that following the filing of the recommended decision, motions must be filed with the NCUA Board.

(d) *Responses.* (1) Except as otherwise provided in this section, within ten days after service of any written motion, or within such other period of time as may be established by the ALJ or the NCUA Board, any party may file a written response to a motion. The ALJ will not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed a consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 747.29 and 747.30.

§ 747.24 Scope of document discovery.

(a) *Limits on discovery.* (1) Subject to the limitations set out in paragraphs (b), (c), and (d) of this section, a party to a proceeding under this subpart may obtain document discovery by serving a written request to produce documents. For purposes of a request to produce documents, the term *documents* includes writings, drawings, graphs, charts, photographs, recordings, electronically stored information, and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party, into a reasonably usable form.

(2) Discovery by use of deposition is governed by § 747.100.

(3) Discovery by use of either interrogatories or requests for admission is not permitted.

(4) Any request to produce documents that calls for irrelevant material; or that is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or that seeks to obtain privileged documents will be denied or modified. A request is unreasonable, oppressive, excessive in scope, or unduly burdensome if, among other things, it fails to include justifiable limitations on the time period covered and the geographic locations to be searched, or the time provided to respond in the request is inadequate.

(b) *Relevance.* A party may obtain document discovery regarding any non-privileged matter that has material relevance to the merits of the pending action.

(c) *Privileged matter.* Privileged documents are not discoverable. Privileges include the attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, and any other privileges the Constitution, any applicable act of Congress, or the principles of common law provide.

(d) *Time limits.* All document discovery, including all responses to discovery requests, must be completed by the date set by the ALJ and no later than 30 days prior to the date scheduled for the commencement of the hearing, except as provided in the Local Rules. No exceptions to this time limit are permitted, unless the ALJ finds on the record that good cause exists for waiving the requirements of this paragraph (d).

§ 747.25 Request for document discovery from parties.

(a) *Document requests.* (1) Any party may serve on any other party a request to produce and permit the requesting party or its representative to inspect or copy any discoverable documents that are in the possession, custody, or control of the party upon whom the request is served. In the case of a request for inspection, the responding party may produce copies of documents or of electronically stored information instead of permitting inspection.

(2) The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected or produced; and

(ii) Must specify a reasonable time, place, and manner for the inspection or production.

(b) *Production or copying*—(1) *General.* Unless otherwise specified by the ALJ or agreed upon by the parties, the producing party must produce copies of documents as they are kept in the usual course of business or organized to correspond to the categories of the request, and electronically stored information must be produced in a form in which it is ordinarily maintained or in a reasonably usable form.

(2) *Costs.* The producing party must pay its own costs to respond to a discovery request, unless otherwise agreed by the parties.

(c) *Obligation to update responses.* A party who has responded to a discovery request with a response that was complete when made is not required to supplement the response to include documents thereafter acquired, unless the responding party learns:

(1) The response was materially incorrect when made; or

(2) The response, though correct when made, is no longer true and a failure to amend the response is, in substance, a knowing concealment.

(d) *Motions to limit discovery.* (1) Any party that objects to a discovery request

may, within 20 days of being served with such request, file a motion in accordance with the provisions of § 747.23 to strike or otherwise limit the request. If an objection is made to only a portion of an item or category in a request, the portion objected to must be specified. Any objections not made in accordance with this paragraph and § 747.23 are waived.

(2) The party who served the request that is the subject of a motion to strike or limit may file a written response within ten days of service of the motion. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, the producing party must reasonably identify all documents withheld on the grounds of privilege and must produce a statement of the basis for the assertion of privilege. When similar documents that are protected by attorney-client privilege, attorney work-product doctrine, bank examination privilege, law enforcement privilege, any government's or government agency's deliberative process privilege, or any other privileges of the Constitution, any applicable act of Congress, or the principles of common law, or are voluminous, these documents may be identified by category instead of by individual document. The ALJ retains discretion to determine when the identification by category is insufficient.

(f) *Motions to compel production.* (1) If a party withholds any documents as privileged or fails to comply fully with a discovery request, the requesting party may, within ten days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 747.23 for the issuance of a subpoena compelling production.

(2) The party who asserted the privilege or failed to comply with the document request may file a written response to a motion to compel within ten days of service of the motion. No other party may file a response.

(g) *Ruling on motions.* After the time for filing responses pursuant to this section has expired, the ALJ will rule promptly on all motions filed pursuant to this section. If the ALJ determines that a discovery request, or any of its terms, calls for irrelevant material, is unreasonable, oppressive, excessive in scope, unduly burdensome, or repetitive of previous requests, or seeks to obtain privileged documents, the ALJ may deny or modify the request, and may issue appropriate protective orders, upon such conditions as justice may require. The pendency of a motion to strike or limit discovery or to compel production is not a basis for staying or continuing the proceeding, unless otherwise ordered by the ALJ. Notwithstanding any other provision in this part, the ALJ may not release, or order a party to produce, documents withheld on grounds of privilege if the party has stated to the ALJ its intention to file a timely motion for interlocutory review of the ALJ's order to produce the documents, and until the motion for interlocutory review has been decided.

(h) *Enforcing discovery subpoenas.* If the ALJ issues a subpoena compelling production of documents by a party, the subpoenaing party may, in the event of noncompliance and to the extent authorized by applicable law, apply to any appropriate United States district court for an order requiring compliance with the subpoena. A party's right to seek court enforcement of a subpoena will not in any manner limit the sanctions that may be imposed by the ALJ against a party who fails to produce subpoenaed documents.

§ 747.26 Document subpoenas to nonparties.

(a) *General rules.* (1) Any party may apply to the ALJ for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain a proposed document subpoena and a brief statement showing the general relevance and reasonableness of the scope of documents sought. The subpoenaing party must specify a reasonable time, place, and manner for making production in response to the document subpoena.

(2) A party may apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 747.24(d). The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all parties. Document subpoenas may be served in any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law.

(3) The ALJ will promptly issue any document subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon such conditions as may be consistent with the Uniform Rules.

(b) *Motion to quash or modify.* (1) Any person to whom a document subpoena is directed may file a motion to quash or modify such subpoena with the ALJ. The motion must be accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on all parties, and any party may respond to such motion within ten days of service of the motion.

(2) Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of privilege, upon which a party could object to a discovery request under § 747.25(d), and during the same time limits during which such an objection could be filed.

(c) *Enforcing document subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ, which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with so much of the document subpoena as the ALJ has not quashed or modified. A party's right to seek court enforcement of a document subpoena will in no way limit the sanctions that may be imposed by the ALJ on a party who induces a failure to comply with subpoenas issued under this section.

§ 747.27 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness' testimony for the record may apply in accordance with the procedures set forth in paragraph (a)(2) of this section, to the ALJ for the issuance of a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The ALJ may issue a deposition subpoena under this section upon showing:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness or infirmity, or will otherwise be unavailable;

(ii) The witness' unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena

must name the witness whose deposition is to be taken and specify the time, manner, and place for taking the deposition. A deposition subpoena may require the witness to be deposed at any place within the country in which that witness resides or has a regular place of employment, by remote means, or such other convenient place or manner, as the ALJ fixes.

(3) Any requested subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the ALJ requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the ALJ orders otherwise, no deposition under this section may be taken on fewer than ten days' notice to the witness and all parties.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the ALJ to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than ten days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn. By stipulation of the parties or by order of the ALJ, a court reporter or other person authorized to administer an oath may administer the oath remotely without being in the physical presence of the deponent. Each party must have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(2) Any party may move before the ALJ for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition.

(3) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition must certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section, or fails to comply with any order of the ALJ, which directs compliance with all or any portion of a deposition subpoena under paragraph (b) or (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by applicable law, apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena with which the subpoenaed party has not complied. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the ALJ on a party who fails to comply with, or procures a failure to comply with, a subpoena issued under this section.

§ 747.28 Interlocutory review.

(a) *General rule.* The NCUA Board may review a ruling of the ALJ prior to the certification of the record to the NCUA Board only in accordance with the procedures set forth in this section and § 747.23.

(b) *Scope of review.* The NCUA Board may exercise interlocutory review of a ruling of the ALJ if the NCUA Board finds:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any request for interlocutory review must be filed by a party with the ALJ within ten days of the ruling and must otherwise comply with § 747.23. Any party may file a response to a request for interlocutory review in accordance with § 747.23(d). Upon the expiration of the time for filing all responses, the ALJ will refer the matter to the NCUA Board for final disposition.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the NCUA Board under this section suspends or stays the proceeding unless otherwise ordered by the ALJ or the NCUA Board.

§ 747.29 Summary disposition.

(a) *In general.* The ALJ will recommend that the NCUA Board issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes there is no genuine issue of material fact to be determined and that the party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 20 days after service of such a motion, or within such time period as allowed by the ALJ, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the moving party contends supports the moving party's position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the opposing party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the written request of any party or on the ALJ's own motion, the ALJ may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the ALJ will determine whether the moving party is entitled to summary

disposition. If the ALJ determines that summary disposition is warranted, the ALJ will submit a recommended decision to that effect to the NCUA Board. If the ALJ finds that no party is entitled to summary disposition, the ALJ will make a ruling denying the motion.

§ 747.30 Partial summary disposition.

If the ALJ determines that a party is entitled to summary disposition as to certain claims only, the ALJ will defer submitting a recommended decision as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the ALJ has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 747.31 Scheduling and prehearing conferences.

(a) *Scheduling conference.* Within 30 days of service of the notice or order commencing a proceeding, the ALJ will direct counsel for all parties to meet with the ALJ at a specified time and manner prior to the hearing for the purpose of scheduling the course and conduct of the proceeding. This meeting is called a ''scheduling conference.'' The schedule for the identification of potential witnesses, the time for and manner of discovery, and the exchange of any prehearing materials including witness lists, statements of issues, stipulations, exhibits, and any other materials may also be determined at the scheduling conference.

(b) *Prehearing conferences.* The ALJ may, in addition to the scheduling conference, on the ALJ's own motion or at the request of any party, direct counsel for the parties to confer with the ALJ at a prehearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact, and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The ALJ may require that a scheduling or prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at the party's expense.

(d) *Scheduling or prehearing orders.* At or within a reasonable time following the conclusion of the scheduling conference or any prehearing conference, the ALJ will serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 747.32 Prehearing submissions.

(a) *Party prehearing submissions.* Within the time set by the ALJ, but in no case later than 20 days before the start of the hearing, each party must file with the ALJ and serve on every other party:

(1) A prehearing statement that states:

(i) The party's position with respect to the legal issues presented;

(ii) The statutory and case law upon which the party relies; and

(iii) The facts that the party expects to prove at the hearing;

(2) A final list of witnesses to be called to testify at the hearing, including the name, mailing address, and electronic mail address of each witness and a short summary of the expected testimony of each witness, which need not identify the exhibits to be relied upon by each witness at the hearing;

(3) A list of the exhibits expected to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 747.33 Public hearings.

(a) *General rule.* All hearings must be open to the public, unless the NCUA Board, in the NCUA Board's discretion, determines that holding an open hearing would be contrary to the public interest. Within 20 days of service of the notice, any respondent may file with the NCUA Board a request for a private hearing, and any party may file a reply to such a request. A party must serve on the ALJ a copy of any request or reply the party files with the NCUA Board. The form of, and procedure for, these requests and replies are governed by § 747.23. A party's failure to file a request or a reply constitutes a waiver of any objections regarding whether the hearing will be public or private.

(b) *Filing document under seal.* Enforcement Counsel, in Enforcement Counsel's discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The ALJ will take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.

§ 747.34 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party showing general relevance and reasonableness of scope of the testimony or other evidence sought, the ALJ may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at the hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any state, territory, or possession of the United States, the District of Columbia, or as otherwise provided by law at any designated place where the hearing is being conducted. The party making the application must serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the ALJ.

(3) The ALJ will promptly issue any hearing subpoena requested pursuant to this section. If the ALJ determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, the ALJ may refuse to issue the subpoena or may issue it in a modified form upon any conditions consistent with this subpart. Upon issuance by the ALJ, the party making the application must serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify the subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within ten days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance but not more than ten days

after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the ALJ which directs compliance with all or any portion of a document subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 747.26(c).

§ 747.35 Conduct of hearings.

(a) *General rules.* (1) *Conduct of hearings.* Hearings must be conducted so as to provide a fair and expeditious presentation of the relevant disputed issues. Each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* Enforcement Counsel will present its case-in-chief first, unless otherwise ordered by the ALJ, or unless otherwise expressly specified by law or regulation. Enforcement Counsel will be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the ALJ will fix the order.

(3) *Examination of witnesses.* Only one counsel for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the ALJ may permit more than one counsel for the party presenting the witness to conduct the examination. A party may have one counsel conduct the direct examination and another counsel conduct re-direct examination of a witness, or may have one counsel conduct the cross examination of a witness and another counsel conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the ALJ directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing must be recorded and transcribed. The reporter will make the transcript available to any party upon payment by that party to the reporter of the cost of the transcript. The ALJ may order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the ALJ's own motion.

(c) *Electronic presentation.* Based on the circumstances of each hearing, the ALJ may direct the use of, or any party may use, an electronic presentation during the hearing. If the ALJ requires an electronic presentation during the hearing, each party will be responsible for their own presentation and related costs, unless the parties agree to another manner in which to allocate presentation responsibilities and costs.

§ 747.36 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable, and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact which may be judicially noticed by a United States district court and any material information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the ALJ or the NCUA Board must appear on the record.

(3) If official notice is requested or taken of any material fact, the parties, upon timely request, must be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a) of this section, any document, including a report of examination, supervisory activity, inspection, or visitation, prepared by an appropriate Federal financial institutions regulatory agency or by a State regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the ALJ's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) When an objection to a question or line of questioning propounded to a witness is sustained, the examining counsel may make a specific proffer on the record of what the examining counsel expected to prove by the expected testimony of the witness either by representation of counsel or by direct questioning of the witness.

(3) The ALJ will retain rejected exhibits, adequately marked for identification, for the record, and transmit such exhibits to the NCUA Board.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing, and that witness has testified in a deposition to which all parties in a proceeding had notice and an opportunity to participate, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the depositions, the ALJ may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition received in evidence at the hearing constitute a part of the record.

§ 747.37 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the ALJ will serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed. Any party may file with the ALJ proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the ALJ or within such longer period as may be ordered by the ALJ.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document. Any party who ails to file timely with the ALJ any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusion.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Reply briefs must be strictly limited to responding to new matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The ALJ will not order the filing by any party of any brief or reply brief in advance of the other party's filing of its brief.

§ 747.38 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 747.37(b), the ALJ will file with and certify to the NCUA Board, for decision, the record of the proceeding. The record must include the ALJ's recommended decision, recommended findings of fact, recommended conclusions of law, and proposed order; all prehearing and hearing transcripts, exhibits, and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The ALJ will serve upon each party the recommended decision, findings, conclusions, and proposed order.

(b) *Filing of index.* At the same time the ALJ files with and certifies to the NCUA Board for final determination the record of the proceeding, the ALJ will furnish to the NCUA Board a certified index of the entire record of the proceeding. The certified index must include, at a minimum, an entry for each paper, document, or motion filed with the ALJ in the proceeding, the date of the filing, and the identity of the filer. The certified index must also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 747.39 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, findings, conclusions, and proposed order under § 747.38, a party may file with the NCUA Board written exceptions to the ALJ's recommended decision, findings, conclusions, or proposed order, to the admission or exclusion of evidence, or to the failure of the ALJ to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the NCUA Board if the party taking exception had an opportunity to raise the same objection, issue, or argument before the ALJ and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in, or omissions from, the ALJ's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the ALJ's recommendations to which exception is taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception.

§ 747.40 Review by the NCUA Board.

(a) *Notice of submission to the NCUA Board.* When the NCUA Board determines that the record in the proceeding is complete, the NCUA Board will serve notice upon the parties that the proceeding has been submitted to the NCUA Board for final decision.

(b) *Oral argument before the NCUA Board.* Upon the initiative of the NCUA Board or on the written request of any party filed with the NCUA Board within the time for filing exceptions, the NCUA Board may order and hear oral argument on the recommended findings, conclusions, decision, and order of the ALJ. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the NCUA Board's final decision. Oral argument before the NCUA Board must be on the record.

(c) *The NCUA Board's final decision.* (1) Decisional employees may advise and assist the NCUA Board in the consideration and disposition of the case. The final decision of the NCUA Board will be based upon review of the entire record of the proceeding, except that the NCUA Board may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The NCUA Board will render a final decision within 90 days after notification of the parties that the case has been submitted for final decision, or 90 days after oral argument, whichever is later, unless the NCUA Board orders that the action or any aspect thereof be remanded to the ALJ for further proceedings. Copies of the final decision and order of the NCUA Board will be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the NCUA Board or required by statute, upon any appropriate State or Federal supervisory authority.

§ 747.41 Stays pending judicial review.

The commencement of proceedings for judicial review of a final decision and order of the NCUA Board may not, unless specifically ordered by the NCUA Board or a reviewing court, operate as a stay of any order issued by the NCUA Board. The NCUA Board may, in the NCUA Board's discretion, and on such terms as the NCUA Board finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for review of that order.

Michael J. Hsu,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on May 31, 2023.

James P. Sheesley,

Assistant Executive Secretary.

By order of the National Credit Union Administration Board.

Dated at Alexandria, VA, this 31st day of October, 2023.

Melane Conyers-Ausbrooks,

Secretary of the NCUA Board.

[FR Doc. 2023–25646 Filed 12–27–23; 8:45 am]

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Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 493

Clinical Laboratory Improvement Amendments of 1988 (CLIA) Fees; Histocompatibility, Personnel, and Alternative Sanctions for Certificate of Waiver Laboratories; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 493

[CMS–3326–F]

RIN 0938–AT47

Clinical Laboratory Improvement Amendments of 1988 (CLIA) Fees; Histocompatibility, Personnel, and Alternative Sanctions for Certificate of Waiver Laboratories

AGENCY: Centers for Medicare & Medicaid Services (CMS) and Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule updates the Clinical Laboratory Improvement Amendments of 1988 (CLIA) fees and clarifies the CLIA fee regulations. This final rule implements a process for sustainable funding for the CLIA program through a biennial two-part increase of CLIA fees. We are finalizing the incorporation of limited/specific laboratory fees, including fees for follow-up surveys, substantiated complaint surveys, and revised certificates. We are also finalizing the distribution of the administrative overhead costs of test complexity determination for waived tests and test systems with a nominal increase in Certificate of Waiver (CoW) fees. In addition, we are finalizing the clarification of the methodology used to determine program compliance fees. This final rule ensures the continuing quality and safety of laboratory testing for the public. This final rule also amends histocompatibility and personnel regulations under CLIA to address obsolete regulations and update the regulations to incorporate technological changes. In addition, this final rule amends the provisions governing alternative sanctions (including civil money penalties, a directed plan of correction, a directed portion of a plan of correction, and onsite State monitoring) to allow for the imposition of such sanctions on CoW laboratories.

DATES: These regulations are effective January 27, 2024, except for instruction 3, amending § 493.2; instructions 14 through 19, amending §§ 493.945, 493.1273, 493.1274, 493.1278, 493.1359, and 493.1405; instruction 20 removing § 493.1406; instructions 21 through 30, amending §§ 493.1407, 493.1411, 493.1417, 493.1423, 493.1443, 493.1445, 493.1449, 493.1451, 493.1455, and 493.1461; instruction 31 removing § 493.1462; and instructions 32 through 36, amending §§ 493.1463, 493.1469, 493.1483, 493.1483, 493.1489, and 493.1491, which are effective December 28, 2024.

FOR FURTHER INFORMATION CONTACT: Penny Keller, CMS, (410) 786–2035; or Heather Stang, CDC, (404) 498–2769.

SUPPLEMENTARY INFORMATION:

Executive Summary

A. Purpose

This final rule clarifies and updates CLIA regulations that protect the health and safety of laboratory consumers and address the financial stability of the CLIA program. Specifically, the final rule: (1) adjusts laboratory fees to provide sustainable funding for the user-fee-funded CLIA program; (2) revises certain requirements for both the histocompatibility test specialty as well as personnel qualifications and responsibilities for CLIA laboratories; and (3) provides additional discretion to CMS by allowing it to impose alternative sanctions against non-compliant Certificate of Waiver laboratories, rather than being limited only to imposing principal sanctions of revocation, suspension or limitation of a laboratory's CLIA certificate.

B. Summary of the Major Provisions

1. Clinical Laboratory Improvement Amendments of 1988 (CLIA) Fees

On October 31, 1988, Congress enacted the Clinical Laboratory Improvement Amendments of 1988 (CLIA) (Pub. L. 100–578), which revised in its entirety section 353 of the Public Health Service Act (PHSA). Section 353(m) of the PHSA requires the Secretary to impose two separate types of fees: ''certificate fees'' and ''additional fees.'' Certificate fees are imposed for the issuance and renewal of certificates and must be sufficient to cover the general costs of administering the CLIA program, including evaluating and monitoring approved proficiency testing (PT) programs and accrediting bodies and implementing and monitoring compliance with program requirements. Additional fees are imposed for inspections of nonaccredited laboratories and for the cost of evaluating accredited laboratories to determine overall if an accreditation organization's standards and inspection process are equivalent to the CLIA program. These evaluations are referred to as validation inspections. The additional fees must be sufficient to cover, among other things, the cost of carrying out such inspections. Certificate and additional fees vary by group or classification of laboratory, based on such considerations as the Secretary determines relevant, which may include the total test volume and scope of the testing being performed by the laboratories, and only a nominal fee may be required for the issuance and renewal of Certificates of Waiver (CoWs).

We issued a notice with comment period in the December 31, 2018 **Federal Register** (83 FR 67723 through 67728) [1] (hereinafter referred to as the December 31, 2018 notice). The December 31, 2018 notice increased fees for laboratories certified under CLIA. The December 31, 2018 notice increased CLIA fees by 20 percent to help ensure the CLIA program could continue to be self-sustaining, as required by law. The 2018 increase was intended to give CMS time to propose a process through rulemaking to allow for ongoing changes to the CLIA fees. Despite that increase, the level of carryover funding available to cover program expenses is projected to decline continuously. As such, the CLIA program will not be self-supporting by the end of FY 2023 without an additional fee increase. The changes finalized in this rule will result in a continuous level of funding that increases as the obligations to the CLIA program increase and keep the program adequately funded over time.

On July 7, 2022, we published a proposed rule (87 FR 44896) [2] (hereinafter referred to as the July 2022 proposed rule) that would make changes to the methodology for determining the amount of the CLIA fees as described in the February 28, 1992 final rule with comment period (57 FR 7002) (hereinafter referred to as the February 1992 final rule) and codified in 42 CFR part 493, subpart F—General Administration. The fees for the CoW, Certificate for Provider-performed Microscopy (PPM) Procedures, and the provisional certificate that we refer to as the Certificate of Registration (CoR) were based on the cost of issuing the

[1] See Medicare Program: Clinical Laboratory Improvement amendments of 1988 (CLIA) Fees; 83 FR 67723; *https://www.federalregister.gov/documents/2018/12/31/2018-28359/medicare-program-clinical-laboratory-improvement-amendments-of-1988-clia-fees.*

[2] *https://www.federalregister.gov/documents/2022/07/26/2022-15300/clinical-laboratory-improvement-amendments-of-1988-clia-fees-histocompatibility-personnel-and.* The public comment period was extended and closed on September 26, 2022 (87 FR 52712). *https://www.federalregister.gov/documents/2022/08/29/2022-18558/clinical-laboratory-improvement-amendments-of-1988-clia-fees-histocompatibility-personnel-and.*

certificates. The Certificate of Accreditation (CoA) and Certificate of Compliance (CoC) fees were based on the annual test volume and scope of testing that separated the laboratories into schedules or groups of laboratories. We generally proposed, and are finalizing in this rule, to continue basing these fees on either the costs of issuing the certificates (CoW, CoR, and PPM) or annual test volume and scope of testing (CoA and CoC). However, we are now including in this final rule additional government costs that were not accounted for in the calculation method outlined in the February 1992 final rule. As one such change, we proposed to allocate, directly from the CoW fees, the administrative overhead costs of the Food and Drug Administration (FDA) process to categorize clinical laboratory tests as waived as described in the memorandum of understanding (MOU) between CMS and FDA (IA19–23). In addition, we proposed to implement certificate fees for the issuance of replacement and revised certificates. Thousands of replacement and revised certificates are generated and mailed annually. We believe this additional certificate fee will encourage laboratories to better manage their certificates, provide accurate information when applying for or updating a CLIA certificate, and cover the costs of producing duplicate or revised documents.

The February 1992 final rule also stated at § 493.645(b)(1) that laboratories issued a CoA would be assessed a fee to cover the cost of evaluating the individual laboratories to determine whether an accreditation program's standards and inspection policies are equivalent to the Federal program. We proposed at the new § 493.645(a)(1) to clarify that all accredited laboratories share in the validation inspections cost. Under § 493.645(b)(1), the accredited laboratories currently pay a fee even though HHS inspects only 5 percent of them annually. The fee is 5 percent of what the inspection cost of an equivalent nonaccredited CoC laboratory would pay based on the test volume and scope (that is, the schedule or group) of the laboratories.

In the February 1992 final rule, the inspection fees for laboratories holding a CoC were based on estimates of the length of time required to perform a laboratory survey in the different schedules multiplied by the estimated hourly rate of three different entities, the State agency, contracted surveyors, and Federal surveyors, that perform surveys. Of these three entities, an hourly rate was established solely for the State agencies, as any contracted surveyors' salaries are paid by their contractual amount. The Federal surveyors perform their surveys in conjunction with non-survey work plus actual costs for travel to those surveys. Given this diversity of costs, it is not feasible to determine a Federal hourly rate for just the survey activities. In the July 2022 proposed rule, we proposed to cease using the hourly rate outlined in current regulations as the basis for determining compliance inspection fees for laboratories holding a CoC and replace it with the methodology proposed in the proposed rule, and which we are finalizing in this final rule. We proposed to keep inspection fees separated by the schedules as previously determined.

The additional fees allowed for in section 353(m) of the PHSA are fees for determining compliance with the CLIA regulations. Some of these fees were previously included in subpart F but were not implemented due to technical limitations. However, we stated in the proposed rule that a new data system that can implement these requirements is under development. Therefore, as discussed further in this final rule, we are finalizing the implementation of additional fees as outlined in the February 1992 final rule, to be effective 30 days after the publication of the final rule, although collection may not begin until the new data system is implemented. We believe the collection of these additional fees will help bridge the shortfall between program expenditures and collections as discussed in section I.A.1.a. of this final rule.

The February 1992 final rule provisions codified at 42 CFR part 493, subpart F—General Administration were numbered too close together to allow new provisions or the separation of existing provisions, for clarification, to stay in numerical order. Therefore, we proposed to redesignate and renumber some provisions so that the flow of this section is easier to follow. For example, we proposed to redesignate current § 493.646 as new § 493.655 to maintain thematic order in that § 493.655, which outlines the payment of fees, is better placed after the provisions discussing the different types of fees. Each such change, including this example, is explained in full at its designated provision within section II. of this final rule.

Upon the final rule effective date, which will be 30 days following publication, we proposed implementing fee increases as described previously in this rule. Using the more recent data available for this final rule, we expect the fee increase to be larger than subsequent fee increases. The fee increase includes an across-the-board increase of 18 percent and an inflation factor (CPI–U) of 1.049598. We utilized the CPI–U factors promulgated by OMB as part of their economic assumptions for budgetary estimates. To calculate the 4.9598 percent compound factor for the 2-year increase, we multiplied together factors for each of the 2 years as follows:

- Factor Year 1 (Budgeted Rate for Fiscal Year (FY) 2024) = 1.026
- Factor Year 2 (Budgeted Rate for FY 2025) = 1.023

The compounded factor = 1.026 × 1.023 = 1.049598.

The 18 percent across-the-board (ATB) increase was determined as the amount that, including newly charged fees and inflation, is the difference necessary to fund total annual projected program obligations and allow for the gradual accumulation of 6 months' worth of obligations as an operating margin at the start of the year. We have calculated that the one-time 18 percent across-the-board increase would generate approximately 12.1 million dollars annually while the inflation factor would generate approximately 4.6 million dollars. Based on the more recent data available for this final rule, the other proposed fees would generate approximately 7.7 million dollars for a total of approximately 24.4 million dollars per year.

We believe this will stabilize the CLIA program and allow us to use the inflation factor for future biennial increases. Should future across-the-board percentages be required, CMS will calculate them as stated in § 493.680(a). The revised certificate fee found at proposed § 493.639(a); the replacement certificate fee found at proposed § 493.639(b); the fees for the follow-up surveys, substantiated complaint surveys, and unsuccessful PT on CoC laboratories found at proposed § 493.643(d)(1) through (4); follow-up surveys on CoA laboratories found at proposed § 493.645(a)(2); and substantiated complaint surveys on CoW, PPM, or CoA laboratories found at proposed § 493.645(b) will be implemented on the effective date of the final rule. However, the collection of the fees is dependent on the new data system being online.

This final rule finalizes the proposed CLIA fee provisions with the modifications described in section II of this final rule.

2. CLIA Requirements for Histocompatibility

The CLIA regulations include requirements specific to certain

laboratory specialties such as microbiology and subspecialties such as endocrinology. Histocompatibility is a type of laboratory testing performed on the tissue of different individuals to determine if one person can accept cells, tissue, or organs from another person. The CLIA regulatory requirements for the specialty of histocompatibility at § 493.1278, including the crossmatching requirements, address laboratory testing associated with organ transplantation and transfusion and testing on prospective donors and recipients. As of January 2023, 247 CLIA-certified laboratories perform testing in this specialty. The specialty of histocompatibility has not been updated since the February 1992 final rule (57 FR 7002). Many of the changes finalized in this rule will remove histocompatibility-specific requirements from § 493.1278 that we have determined are addressed by the general QC requirements at §§ 493.1230 through 493.1256 and 493.1281 through 493.1299. We believe that removing specific requirements for obsolete methods and practices and eliminating redundant requirements will decrease the burden on laboratories performing histocompatibility testing. We have heard from interested parties, particularly the transplantation community, that physical crossmatches are a barrier to modernized decision-making approaches on organ acceptability based on risk assessment.

For the crossmatching regulations that this final rule will amend, HHS requested input from the Clinical Laboratory Improvement Advisory Committee (CLIAC) on the acceptability and application of newer crossmatching techniques in lieu of physical crossmatching. At its November 2014 meeting, CLIAC made the following recommendations [3] for CMS to explore:

- Regulatory changes or guidance(s) that would allow virtual crossmatching to replace physical crossmatching as a pre-requisite for organ transplant.
- Appropriate criteria and decision algorithms, based on CLIAC's deliberation of the Virtual Crossmatch Workgroup's input, under which virtual crossmatching would be an appropriate substitute for physical crossmatching. The determination of appropriate criteria and decision algorithms should involve a process that includes an open comment period.

In the 2018 RFI (83 FR 1005 through 1006, 1008), we requested comments and information related to histocompatibility and crossmatching requirements that may have become outdated and requested suggestions for updating these requirements to align with current laboratory practice. The comments we received in response to the 2018 RFI recommended updating the current histocompatibility and crossmatching requirements to align with current laboratory practices. The CLIAC recommendations and the comments from the 2018 RFI informed the changes that we proposed in the July 2022 proposed rule, and which we are finalizing in this final rule.

This final rule finalizes the proposed histocompatibility provisions of the proposed rule with the modifications described in section III.A. of this final rule.

3. CLIA Requirements for Personnel

The CLIA regulations related to personnel requirements were updated with minor changes to the doctoral high complexity LD qualifications in the 2003 final rule (68 FR 3713, Jan. 24, 2003), but otherwise have remained unchanged since we published the February 1992 final rule with comment period (57 FR 7002). In the 2018 RFI (83 FR 1005 through 1006, 1008), we sought public comment and information related to CLIA personnel requirements in the following areas: nursing degrees; physical science degrees; personnel competency assessment (CA); personnel training and experience; and non-traditional degrees. These are areas that the CDC, CMS, interested parties, and State agency surveyors identified as relevant to our efforts to update the CLIA personnel requirements to better reflect current knowledge, changes in the academic context, and advancements in laboratory testing.

In response to our questions about nursing degrees, the majority of commenters did not concur that nursing degrees were equivalent to a biological or chemical sciences degree. However, some interested parties suggested nursing degrees could be used as a separate qualifying degree for nonwaived testing personnel (TP). In response to our questions about physical science degrees as well as non-traditional degrees, interested parties commented that a physical science degree was hard to define. In considering how to evaluate physical science and other non-traditional degrees, some commenters recommended that we evaluate coursework taken using a semester-hour educational algorithm to qualify individuals for CLIA personnel positions. In response to the questions about competency assessment (CA), many commenters stated that individuals with an applicable associate degree should be permitted to perform CA on moderate complexity TP. Some commenters stated that required training should depend on the complexity of the testing to be performed and that all nonwaived testing should require training related to the individual's laboratory responsibilities. Several commenters also stated that any required training and experience should be in a CLIA-certified laboratory. Many commenters agreed that all training and experience should be documented; many noted that documentation from a former employer should be acceptable, assuming it provided specific details about the individual's job, training, and CA.

We also requested input from CLIAC for recommended changes to the CLIA personnel requirements found in subpart M—Personnel for Nonwaived Testing, §§ 493.1351 through 493.1495. CLIAC made 12 recommendations at the April 2019 meeting to improve CLIA personnel regulations, including: (1) making biological science degrees acceptable for laboratory personnel and considering candidates with other degree backgrounds based on coursework; (2) removing the degree in physical science from the CLIA regulations due to its broadness; and (3) requiring personnel to have training and experience in their areas of responsibility. Following this, CMS and CDC collaborated to develop a list of personnel regulation updates that we proposed in the July 2022 proposed rule.[4]

We are finalizing the proposed provisions for personnel with the modifications described in section III.B. in this final rule.

4. Alternative Sanctions for CoW Laboratories

As discussed in section III.C. of the proposed rule and this final rule, we proposed, and are finalizing, an amendment to § 493.1804(c)(1) to allow CMS to impose alternative sanctions on CoW laboratories, as appropriate. CoW laboratories are laboratories that only perform waived tests, that is, simple laboratory examinations and procedures that have an insignificant risk of an erroneous result. For example, a urine dipstick pregnancy test is a waived test. The current regulations state that we do not impose alternative sanctions on CoW laboratories because those

[3] *https://www.cdc.gov/cliac/docs/summary/cliac1114_summary.pdf.*

[4] *https://www.federalregister.gov/documents/2022/07/26/2022-15300/clinical-laboratory-improvement-amendments-of-1988-clia-fees-histocompatibility-personnel-and.*

laboratories are not inspected for compliance with condition-level requirements (§ 493.1804(c)(1)). However, while not subject to the biennial routine surveys, CoW laboratories are surveyed as a result of a complaint, and based on the complaint survey, may be found to be out of compliance with a condition-level requirement. In the absence of alternative sanctions, our only recourse in cases of compliance issues found at CoW laboratories is to apply principal sanctions (that is, revocation, suspension, or limitation of the CLIA certificate). We believe the ability to levy alternative sanctions (that is, civil money penalties, a directed plan of correction, a directed portion of a plan of correction, and onsite State monitoring) on CoW laboratories helps CMS ensure appropriate sanctions are applied to CoW laboratories, as in the case of other certificate types (certificate of PPM, CoR, CoC, CoA).

In addition, we believe that this finalized change will reduce burden on CoW laboratories. The ability to impose alternative sanctions will be particularly useful in instances in which we find proficiency testing (PT) referral violations. PT is the testing of unknown samples sent to a laboratory by an HHS-approved PT program to check the laboratory's ability to determine the correct testing results. This final rule amends the CoW regulations at § 493.1804(c)(1) to allow for the application of alternative sanctions where warranted, in addition to or in lieu of principal sanctions.

We are finalizing the provisions for alternative sanctions for CoW laboratories as described in section III.C. in this final rule.

C. Summary of Costs and Benefits

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TABLE 1: Costs and Benefits

Provision Description	Total Impact/Costs
CLIA Fee Regulations for CLIA laboratories	We estimate that the overall impact of updating the CLIA fees would be an increase of $24,371,183. The final rule impacts approximately 298,791 CLIA certified laboratories: Certificate of Waiver (CoW) = 235,175; Certificate for Provider-performed Microscopy (PPM) Procedures = 29,717; Certificate of Registration (CoR) = 2,891; Certificate of Compliance (CoC) = 17,694; Certificate of Accreditation (CoA) = 15,935. (Data from Casper 85s 02/07/2022). Although the effect of the changes will increase laboratory costs, implementation of these changes would be negligible in terms of workload for laboratories as these fee increases are operational and technical in nature and do not require additional time to be spent by laboratory employees.
Histocompatibility and Personnel Regulations for CLIA **laboratories**	We estimate that the overall impact of adding requirements for the changes in personnel, histocompatibility, and travel for LD on-site visits would range from $20,894,051 to $30,520,189 in the first year. The estimated costs included: (1) Laboratories updating policies and procedures related to personnel and histocompatibility, (2) Accrediting organizations and exempt States updating policies and procedures related to personnel, histocompatibility, and laboratory director site visit, (3) Travel for site visits-Driving, and 4) Travel for site visits-Flying. We estimate that the cost to laboratories, accrediting organizations, and exempt States to comply with the changes in the final rule would range between $20,894,051 and $30,520,189 in 2023 dollars for the first year and between $628,437 and $1,659,134 in subsequent years. Although the requirements will increase laboratory costs, the implementation of the final rule will streamline and simplify regulations, add flexibility in laboratory hiring practices, ensure that the LD is on-site at least twice per year, and align histocompatibility testing with current methods and practices.
Alternative Sanction	We believe this final rule will increase flexibility, decrease potential burden while moving those laboratories toward compliance, and have no added economic impact on CoW laboratories. As previously described, this regulatory change could decrease the burden for sanctions imposed for improper proficiency testing referral. Although we have no data indicating that principal sanctions have been imposed on CoW laboratories for this reason in the past, if it occurred in the future, the ability to impose alternative sanctions, if appropriate, would be less punitive and potentially decrease any quantifiable economic impact. At this time, we cannot quantify what that impact would be.

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I. Background

A. Clinical Laboratory Improvement Amendments of 1988 (CLIA) Fees

On October 31, 1988, Congress enacted the Clinical Laboratory Improvement Amendments of 1988 (CLIA) (Pub. L. 100–578), which revised in its entirety section 353 of the Public Health Service Act (PHSA). Section 353(m) of the PHSA requires the Secretary to impose two separate types of fees: ''certificate fees'' and ''additional fees.'' Certificate fees are imposed for the issuance and renewal of certificates and must be sufficient to cover the general costs of administering the CLIA program, including evaluating and monitoring approved proficiency testing (PT) programs and accrediting bodies and implementing and monitoring compliance with program requirements. Additional fees are imposed for inspections of nonaccredited laboratories and for the cost of evaluating accredited laboratories to determine overall if an accreditation organization's standards and inspection process are equivalent to the CLIA program. These evaluations are referred to as validation inspections. The additional fees must be sufficient to

cover, among other things, the cost of carrying out such inspections. Certificate and additional fees vary by group or classification of laboratory, based on such considerations as the Secretary determines relevant, which may include the total test volume and scope of the testing being performed by the laboratories, and only a nominal fee may be required for the issuance and renewal of Certificates of Waiver (CoWs).

In January 2018, we published the ''Request for Information: Revisions to Personnel Regulations, Proficiency Testing Referral, Histocompatibility Regulations and Fee Regulations under the Clinical Laboratory Improvement Amendments (CLIA) of 1988'' (83 FR 1004). As part of the general solicitation for comments related to the CLIA fees, more than a few commenters noted that the CLIA compliance and additional fees have not been updated since 1997 and supported increasing the fees. Some of these commenters suggested that the CLIA fees be reviewed annually and updated as needed to cover the program costs of performing surveys.

Based on comments from the public on the Request for Information (RFI), we issued a notice with comment period in the December 31, 2018 **Federal Register** (83 FR 67723 through 67728) (hereinafter referred to as the December 31, 2018 notice). The December 31, 2018 notice increased fees for laboratories certified under CLIA. The December 31, 2018 notice increased CLIA fees by 20 percent to help ensure the CLIA program could continue to be self-sustaining, as required by law. The 2018 increase was intended to give CMS time to propose a process through rulemaking to allow for ongoing changes to the CLIA fees. The changes finalized in this rule will result in a continuous level of funding that increases as the obligations to the CLIA program increase and keep the program adequately funded over time.

In September 2020, we released new tools to reduce burdensome paperwork and authorization delays for laboratories seeking CLIA certification. Laboratories now have the option to pay CLIA certification fees on the CMS CLIA program website. Online payments are processed overnight, which is substantially faster than hard-copy checks.[5]

In July 2022, we published a proposed rule (87 FR 44896) [6] (hereinafter referred to as the July 2022 proposed rule) that would make changes to the methodology for determining the amount of the CLIA fees as described in the February 28, 1992 final rule with comment period (57 FR 7002) (hereinafter referred to as the February 1992 final rule) and codified in 42 CFR part 493, subpart F—General Administration. The fees for the CoW, Certificate for Provider-performed Microscopy (PPM) Procedures, and the provisional certificate that we refer to as the Certificate of Registration (CoR) were based on the cost of issuing the certificates. The Certificate of Accreditation (CoA) and Certificate of Compliance (CoC) fees were based on the annual test volume and scope of testing that separated the laboratories into schedules or groups of laboratories. We generally proposed, and are finalizing in this rule, to continue basing these fees on either the costs of issuing the certificates (CoW, CoR, and PPM) or annual test volume and scope of testing (CoA and CoC). However, as described below, we are now including additional government costs that were not accounted for in the calculation method outlined in the February 1992 final rule.

As one such change, we proposed to allocate, directly from the CoW fees, the administrative overhead costs of the Food and Drug Administration (FDA) process to categorize clinical laboratory tests as waived as described in the memorandum of understanding (MOU) between CMS and FDA (IA19–23). We believe this is appropriate because the functions of the FDA under the MOU are to provide administrative support to the CLIA program, such as by categorizing tests as waived.

In addition, we proposed to implement certificate fees for the issuance of replacement and revised certificates. We receive numerous requests daily for replacements of lost and misplaced certificates and for revised copies of certificates after demographic, laboratory director (LD), and/or specialty/subspecialty changes. As a result, thousands of replacement and revised certificates have been generated and mailed annually. We believe this additional certificate fee will encourage laboratories to better manage their certificates, provide accurate information when applying for or updating a CLIA certificate, and cover the costs of producing duplicate or revised documents.

The February 1992 final rule also stated at § 493.645(b)(1) that laboratories issued a CoA would be assessed a fee to cover the cost of evaluating the individual laboratories to determine whether an accreditation program's standards and inspection policies are equivalent to the Federal program. The February 1992 final rule explained that there would be a random sample of 5 percent of all accredited laboratories inspected by the Department of Health & Human Services (HHS), and the findings compared to the findings of the Accreditation Organizations (AOs). The February 1992 final rule stated that all accredited laboratories would share the cost of this activity and that the fees would be the same as for inspections by nonaccredited laboratories. We proposed new § 493.645(a)(1) to clarify that all accredited laboratories share in the validation inspections cost. Under § 493.645(b)(1), the accredited laboratories currently pay a fee even though HHS inspects only 5 percent of them annually. The fee is 5 percent of what the inspection cost of an equivalent nonaccredited CoC laboratory would pay based on the test volume and scope (that is, the schedule or group) of the laboratories.

In the February 1992 final rule, the inspection fees for laboratories holding a CoC were based on estimates of the length of time required to perform a laboratory survey in the different schedules multiplied by the estimated hourly rate of three different entities that perform surveys. As outlined in the February 1992 final rule, we believe this methodology was a starting point intended to allow the methodology to be adjusted as historical data and experience were gained. The three inspection entities mentioned in the February 1992 final rule were the State agency, contracted surveyors, and Federal surveyors. Of these three entities, an hourly rate was established solely for the State agencies, as any contracted surveyors' salaries are paid by their contractual amount. The Federal surveyors perform their surveys in conjunction with non-survey work plus actual costs for travel to those surveys. Given this diversity of costs, it is not feasible to determine a Federal hourly rate for just the survey activities.

Due to these difficulties, in July 2022 we proposed to cease using the hourly rate outlined in current regulations as the basis for determining compliance inspection fees for laboratories holding a CoC and replace it with the methodology proposed in the proposed rule, and which we are finalizing in this

[5] *https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Index.*

[6] *https://www.federalregister.gov/documents/2022/07/26/2022-15300/clinical-laboratory-improvement-amendments-of-1988-clia-fees-histocompatibility-personnel-and.* The public comment period was extended and closed on September 26, 2022 (87 FR 52712). *https://www.federalregister.gov/documents/2022/08/29/2022-18558/clinical-laboratory-improvement-amendments-of-1988-clia-fees-histocompatibility-personnel-and.*

final rule. We proposed to keep inspection fees separated by the schedules as previously determined.

The additional fees allowed for in section 353(m) of the PHSA are fees for determining compliance with the CLIA regulations. Some of these fees were previously included in subpart F but were not implemented due to technical limitations. However, we stated in the proposed rule that a new data system that can implement these requirements is under development. While initially targeted for completion in October 2022, the new data system remains under development. Therefore, as discussed further in this final rule, we are finalizing the implementation of additional fees as outlined in the February 1992 final rule, to be effective 30 days after the publication of the final rule, although collection may not begin until the new data system is implemented. We believe the collection of these additional fees will help bridge the shortfall between program expenditures and collections as discussed in section I.A.1.a. of this final rule.

The February 1992 final rule provisions codified at 42 CFR part 493, subpart F—General Administration were numbered too close together to allow new provisions or the separation of existing provisions, for clarification, to stay in numerical order. Therefore, we proposed to redesignate and renumber some provisions so that the flow of this section is easier to follow. For example, we proposed to redesignate current § 493.645(a) as § 493.649(a) and remove the current regulatory text at § 493.649. In addition, we proposed redesignating current § 493.646 as new § 493.655 to maintain thematic order in that § 493.655, which outlines the payment of fees, is better placed after the provisions discussing the different types of fees. Each such change, including this example, is explained in full at its designated provision within section II. of this final rule.

Upon the final rule effective date, which will be 30 days following publication, we proposed implementing fee increases as described previously in this rule. Using the more recent data available for this final rule, we expect the fee increase to be larger than subsequent fee increases. The fee increase includes an across-the-board increase of 18 percent and an inflation factor (CPI–U) of 1.049598. We utilized the CPI–U factors promulgated by OMB as part of their economic assumptions for budgetary estimates. To calculate the 4.9598 percent compound factor for the 2-year increase, we multiplied together factors for each of the 2 years as follows:

- Factor Year 1 (Budgeted Rate for Fiscal Year (FY) 2024) = 1.026
- Factor Year 2 (Budgeted Rate for FY 2025) = 1.023

The compounded factor = 1.026 × 1.023 = 1.049598.

The 18 percent across-the-board (ATB) increase was determined as the amount that, including newly charged fees and inflation, is the difference necessary to fund total annual projected program obligations and allow for the gradual accumulation of 6 months' worth of obligations as an operating margin at the start of the year. We have calculated that the one-time 18 percent across-the-board increase would generate approximately 12.1 million dollars annually while the inflation factor would generate approximately 4.6 million dollars. Based on the more recent data available for this final rule, the other proposed fees would generate approximately 7.7 million dollars for a total of approximately 24.4 million dollars per year. These projections are summarized in Table 2.

TABLE 2: Projected FY 2024 Collections With the Fee Increases Implemented in this Final Rule

	FY 2024 Post Final Rule
Across the Board	$12.1 million
Inflation Factor (1.049)	$4.60 million
Other Fees	$7.7 million
Total	$24.4 million

We believe this will stabilize the CLIA program and allow us to use the inflation factor for future biennial increases. Should future across-the-board percentages be required, CMS will calculate them as stated in § 493.680(a). The revised certificate fee found at proposed § 493.639(a); the replacement certificate fee found at proposed § 493.639(b); fees for the follow-up surveys, substantiated complaint surveys, and unsuccessful PT on CoC laboratories found at proposed § 493.643(d)(1) through (4); follow-up surveys on CoA laboratories found at proposed § 493.645(a)(2); and substantiated complaint surveys on CoW, PPM, or CoA laboratories found at proposed § 493.645(b) will be implemented on the effective date of the final rule. However, the collection of the fees is dependent on the new data system being online.

1. CLIA Budget Process

In the proposed rule, Table 1 provided a summary of projected user fee collections, program obligations, and carryover balances from FY 2021 through the end of FY 2025. In Table 3 of this final rule, we have expanded the information as presented in Table 1 of the proposed rule to include actual figures for FYs 2019 through 2022 which show the effect the 20 percent increase in 2019 had on CLIA's finances and updated projections for FYs 2023 through FY 2026 reflecting updated estimates of program spending, user fee collections, carryover, and inflation. Table 3 does not include any proposed or finalized fee increases. We are also including additional detail related to total CLIA obligations. Start of year carryover balances plus anticipated collections at current rates, net of sequester, equals budgetary resources available for obligation, or spending, in a given fiscal year. This amount, less projected program obligations, equals end-of-year carryover. The continued decrease in the projected end-of-year carryover shows that despite the 2019 increase, financial obligations for the CLIA program continue to significantly outpace user fee collections at current rates. This final rule will create sustainable funding in a few different ways.

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TABLE 3: CMS Actual and Projected CLIA Obligations and Fee Collections Without Finalized Fee Increases

	FY 2019 Actual	FY 2020 Actual	FY 2021 Actual	FY 2022 Actual	FY 2023	FY 2024	FY 2025	FY 2026
Available Carryover (SOY)*	$35,801,852	$37,828,689	$37,971,994	$35,606,303	$36,705,507	$26,066,877	$13,434,912	($1,006,235)
New collections	$60,154,865	$63,969,709	$70,009,410	$72,694,131	$70,019,000	$70,019,000	$70,019,000	$70,019,000
Sequester	($3,729,602)	($3,774,213)	($3,990,536)	($4,143,565)	($3,991,096)	($3,991,096)	($3,991,096)	($3,991,096)
Available Budgetary Resources**	$92,227,115	$98,024,185	$103,990,868	$104,156,869	$102,733,631	$92,095,002	$79,616,370	$65,332,083
State Survey Costs	$21,672,324	$21,958,788	$22,988,860	$26,184,632	$28,726,380	$29,473,266	$30,151,151	$30,844,627
Other Operations Costs	$24,407,020	$20,936,453	$29,418,719	$26,082,439	$26,745,981	$27,441,377	$28,072,529	$28,718,197
Administration Costs	$18,149,927	$18,682,234	$19,619,008	$19,619,008	$21,194,393	$21,745,447	$22,245,592	$22,757,241
Total Obligations***	$64,229,272	$61,577,475	$72,026,587	$71,765,273	$76,666,754	$78,660,090	$80,469,272	$82,320,065
Carryover (EOY)*	$27,997,843	$36,446,710	$31,964,280	$32,391,596	$26,066,877	$13,434,912	($1,006,235)	($17,298,175)

*SOY = Start of Year; EOY = End of Year. SOY carryover amounts in fiscal years 2019 through 2022 include the effects of prior year adjustments.

** Budgetary resources mean amounts available to be obligated. In this instance, it means the sum of available carryover + new user fee collections less projected sequestration reductions.

*** Obligations as of fiscal year end. The figure for Total Obligations is the sum of State Survey Costs, Other Operations Costs and Costs of Administration.

a. Two-Part Periodic Increase

As we explained in the July 2022 proposed rule, establishing a two-part periodic increase could be easily implemented and would provide an understandable calculation of fee increases. CMS will publish future fee increases in a notice in the **Federal Register**. CMS will not publish a notice in the **Federal Register** if no fee increases are required. Every 2 years, in preparation for the biennial fee increase, we will calculate the inflation adjustment using the Consumer Price Index for all Urban Consumers (CPI–U). At that time, CMS will look back over the previous 2 years and determine if the calculated CPI–U inflation adjustment will be sufficient to cover actual program obligations. If the total fee amounts, including any increase applied, do not match or exceed actual program obligations based on a review of the obligations of the previous 2 years, CMS will apply an additional across-the-board increase to each laboratory's fees by calculating the difference between the total fee amounts and actual program obligations. If CMS determines that the inflation adjustment is not enough to cover the program obligations, an additional across-the-board amount will be added to the adjustment to ensure that the fee increase is spread equally across all fees in a flat percentage amount, which will cover CLIA obligations. The adjusted fees will become part of the baseline for the next biennial increase. If the level of collections was found to be sufficient to cover program obligations, CMS will not implement a biennial inflation adjustment or an across-the-board fee increase. With any fee increase, the amount of the increase and a summary of CLIA obligations along with the calculations of the increase using the CPI–U and any determined shortfall will be published in a notice in the **Federal Register**.

Table 4 shows a representation of the change in national average laboratory fees for the two-part increase of 4.9598 percent over the current fees with a one-time 18 percent across the board increase at the time of implementation.

TABLE 4: Examples, Two-part Increase per Certificate Type *

National Average CoC compliance fee/CoA Validation Survey fee					CLIA Biennial Certificate fees					
Laboratory classification (schedule)	Current average		Example, One-Time 18% Across the board with Biennial Increase of 4.96%		Current average			Example, One-Time 18% Across the board with Biennial Increase of 4.96%		
	CoC	CoA	CoC	CoA	CoC/CoA	CoW	PPM	CoC/CoA	CoW***	PPM
LVA**	$360	$18	$446	$22	$180	-	-	$223	-	-
A	$1,192	$60	$1,477	$74	$180	-	-	$223	-	-
B	$1,591	$80	$1,970	$98	$180	-	-	$223	-	-
C	$1,988	$99	$2,463	$123	$516	-	-	$639	-	-
D	$2,336	$117	$2,894	$145	$528	-	-	$654	-	-
E	$2,684	$134	$3,325	$166	$780	-	-	$966	-	-
F	$3,032	$152	$3,755	$188	$1,320	-	-	$1,635	-	-
G	$3,380	$169	$4,187	$209	$1,860	-	-	$2,304	-	-
H	$3,728	$186	$4,618	$231	$2,448	-	-	$3,032	-	-
I	$4,076	$204	$5,049	$252	$7,464	-	-	$9,244	-	-
J	$4,408	$220	$5,459	$273	$9,528	-	-	$11,801	-	-
Not applicable	-	-	-	-	-	$180	$240	-	$248	$297

*Note: The Certificate of Registration (CoR) fee would increase from the $150 to $184.
**LVA "Schedule A, Low Volume".
***CoW $248 includes $223 + $25 CoW one-time increase.

b. Collection of Other Authorized Fees

The CLIA regulations also authorize the collection of other fees; however, the program has historically not exercised its authority in collecting these fees due to technical difficulties. With the improvement in technology since 1992, we will be enforcing existing regulatory authority in the collection of these fees as well as clarifying circumstances when such fees are applicable. This final rule will implement collection of these other fees, which are laboratory specific and provide an incentive for laboratories to remain compliant with all provisions of the CLIA regulations.

The fees include:

- A fee for follow-up surveys to determine correction of the deficient practices found in either a CoC survey or a CoA validation survey;
- An addition of a specialties survey fee when it is necessary to determine compliance of testing in one or more additional specialties outside of the CoC survey cycle;
- A substantiated complaint survey fee;
- A fee for a desk review of unsuccessful PT performance;
- A fee for a replacement certificate when a laboratory loses or destroys a CLIA certificate and requests a replacement certificate; and
- A fee for issuing a revised certificate when the laboratory changes the laboratory director or other information found on a certificate and requests a new certificate to reflect the changes.

Table 5 projects the national average fees per incident. These fees were previously authorized in the February 1992 final rule but were not collected. We are now finalizing the collection of these additional fees. We totaled the number of follow-up surveys, substantiated complaints, and unsuccessful PT events and multiplied them by the national average number of hours recorded by the State survey agencies for these activities in FY2019. For follow-up surveys, substantiated complaints, and unsuccessful PT events we then multiplied that by the national average unit cost, which is $108.78 in FY2023. The amounts for the revised certificates and replacement certificates are the fee amount as discussed in section II.C. of this final rule, specifically at § 493.639(a).

TABLE 5: Projection of other Authorized Fees per Certificate Type

Projected National Average Other Authorized fees					
Certificate type	**Follow-up surveys (including those for the addition of specialties)**	**Substantiated Complaint Surveys**	**Unsuccessful Proficiency Testing (PT) event**	**Replacement Certificates**	**Revised Certificates**
Certificate of Compliance (CoC)	$497	$2836	$780	$75	$150
Certificate of Accreditation (CoA)	$497	$7564	$780	$75	$95
Certificate of Registration (CoR)	$497	$4230	$780	$75	$150
Certificate of Waiver (CoW)	n/a	$2059	n/a	$75	$95
Certificate for Provider-performed Microscopy (PPM) Procedures	n/a	$3858	n/a	$75	$150

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2. CoW Fee Increase

This final rule authorizes a fee increase for the CoW. A CoW laboratory is limited to performing tests categorized by FDA as waived, which are simple laboratory examinations and procedures that have an insignificant risk of an erroneous result, including those that employ methodologies that are so simple and accurate as to render the likelihood of erroneous results by the user negligible, or that the Secretary has determined pose no unreasonable risk of harm to the patient even if performed incorrectly. Some examples of waived tests include fingerstick tests for blood glucose or cholesterol. As part of our financial obligations to administer the CLIA program, we compensate FDA for its role in determining if tests and test systems meet criteria to be categorized as waived tests/test systems. This final rule implements a nominal increase for CoW fees which will offset program obligations to FDA for its role under the CMS–FDA MOU (IA19–23) in categorizing tests and test systems as waived. The obligation to CLIA, defined by the MOU and calculated against the number of CoW laboratories, is approximately $25 per laboratory to cover the FDA obligation. The additional $25.00 will increase the current $180.00 biennial CoW fee to $205.00.

B. CLIA Requirements for Histocompatibility, Personnel, and Alternative Sanctions for CoW Laboratories

CLIA requires any laboratory that examines human specimens for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of health, of human beings to be certified by the Secretary for the categories of examinations or procedures performed by the laboratory. The implementing regulations at 42 CFR part 493 specify the conditions and standards that must be met to achieve and maintain CLIA certification. These conditions and standards strengthen Federal oversight of clinical laboratories

and help ensure the accuracy and reliability of patient test results.

CMS is always looking for ways to improve our programs and better serve our beneficiaries. Concerning laboratory oversight, HHS endeavors to improve consistency in the application of laboratory standards, coordination, collaboration, and communication in both routine and emergent situations, thereby further improving laboratory oversight and, ultimately, patient care. The regulations related to CLIA histocompatibility and personnel requirements have not been updated since 1992 [7] and 2003,[8] and the regulations for CoW laboratory alternative sanctions have not been updated since 1992.[9] HHS believes it is time to update these regulations to reflect the current state of the American health care system and new advances in technology.

HHS sought expert advice to inform our decision-making on the regulatory updates finalized in this rule. We solicited advice on several topics addressed in this rule from the Clinical Laboratory Improvement Advisory Committee (CLIAC), the official Federal advisory committee charged with advising HHS regarding appropriate regulatory standards for ensuring accuracy, reliability, and timeliness of laboratory testing. On January 9, 2018, we also issued a Request for Information [10] (RFI) that solicited input from the public on issues related to CLIA personnel and histocompatibility requirements, and alternative sanctions for CoW laboratories. We received approximately 8,700 total comments in response to the 2018 RFI. The CLIAC recommendations and information received in response to the 2018 RFI helped us determine the policies that were proposed in the July 2022 proposed rule, for which we received 20,574 public comments. We considered the public comments received in determining the policies finalized in this final rule.

This final rule amends histocompatibility and personnel regulations to address obsolete regulations and update the regulations to incorporate changes in technology. This final rule also amends § 493.1804(c) to allow alternative sanctions to be imposed on CoW laboratories. We summarize and respond to the public comments on these proposals and summarize our final policies in section III of this final rule.

1. Histocompatibility

The CLIA regulations include requirements specific to certain laboratory specialties such as microbiology and subspecialties such as endocrinology. Histocompatibility is a type of laboratory testing performed on the tissue of different individuals to determine if one person can accept cells, tissue, or organs from another person. The CLIA regulatory requirements for the specialty of histocompatibility at § 493.1278, including the crossmatching requirements, address laboratory testing associated with organ transplantation and transfusion and testing on prospective donors and recipients. As of January 2023, 247 CLIA-certified laboratories perform testing in this specialty. The current specialty regulations were published in the 1992 final rule with comment period, and additional changes were made in the 2003 final rule. Specifically, the 2003 final rule changed the regulations to decrease the number of specialty/subspecialty-specific quality control (QC) regulations in instances where general QC requirements would apply. The specialty of histocompatibility has not yet been similarly updated. Many of the changes finalized in this rule will remove histocompatibility-specific requirements from § 493.1278 that we have determined are addressed by the general QC requirements at §§ 493.1230 through 493.1256 and 493.1281 through 493.1299. We believe that removing specific requirements for obsolete methods and practices and eliminating redundant requirements will decrease the burden on laboratories performing histocompatibility testing. We have heard from interested parties, particularly the transplantation community, that physical crossmatches are a barrier to modernized decision-making approaches on organ acceptability based on risk assessment.

For the crossmatching regulations that this final rule will amend, HHS requested input from CLIAC on the acceptability and application of newer crossmatching techniques in lieu of physical crossmatching. The CLIAC gathered information on the acceptability and application of newer crossmatching techniques for transplantation because there have been advances in the field of transplantation since 1992. These advances have made the physical crossmatch less significant in non-sensitized patients. The CLIAC stated that histocompatibility testing has advanced in technology overtime, from using cell-based assays to complex testing procedures such as molecular typing and solid-phase platforms for antibody detection, with improved accuracy and sensitivity. Significant changes have occurred in the clinical practice of transplantation (immunosuppression, desensitization practices), and improvements in anti-rejection therapies have led to improved outcomes and mitigation of risk due to human leukocyte antigen (HLA) antibodies. At its November 2014 meeting, CLIAC made the following recommendations [11] for CMS to explore:

- Regulatory changes or guidance(s) that would allow virtual crossmatching to replace physical crossmatching as a pre-requisite for organ transplant.
- Appropriate criteria and decision algorithms, based on CLIAC deliberation of the Virtual Crossmatch Workgroup's input, under which virtual crossmatching would be an appropriate substitute for physical crossmatching. The determination of appropriate criteria and decision algorithms should involve a process that includes an open comment period.

In the 2018 RFI (83 FR 1005 through 1006, 1008), we requested comments and information related to histocompatibility and crossmatching requirements that may have become outdated and requested suggestions for updating these requirements to align with current laboratory practice. The comments we received in response to the 2018 RFI recommended updating the current histocompatibility and crossmatching requirements to align with current laboratory practices. The CLIAC recommendations and the comments from the 2018 RFI informed the changes that we proposed in the July 2022 proposed rule, and which we are finalizing in this final rule, after consideration of comments received.

2. Personnel

The CLIA regulations related to personnel requirements were updated with minor changes to the doctoral high complexity LD qualifications in the

[7] See the ''Medicare, Medicaid and CLIA Programs; Regulations Implementing the Clinical Laboratory Improvement Amendments of 1988 (CLIA)'' final rule with comment period (57 FR 7002) that published in the February 28, 1992 **Federal Register** (hereinafter referred to as the ''1992 final rule with comment period'').

[8] See the ''Medicare, Medicaid, and CLIA Programs; Laboratory Requirements Relating to Quality Systems and Certain Personnel Qualifications'' final rule (68 FR 3640) that published in the January 24, 2003 **Federal Register** (hereinafter referred to as the ''2003 final rule'').

[9] See the 1992 final rule with comment period.

[10] See the ''Request for Information: Revisions to Personnel Regulations, Proficiency Testing Referral, Histocompatibility Regulations and Fee Regulations Under the Clinical Laboratory Improvement Amendments of 1988 (CLIA)'' RFI (83 FR 1004) that published in the January 9, 2018 **Federal Register** (hereinafter referred to as the ''2018 RFI'').

[11] *https://www.cdc.gov/cliac/docs/summary/cliac1114_summary.pdf.*

2003 final rule (68 FR 3713) but otherwise have remained unchanged since we published the February 1992 final rule with comment period (57 FR 7002). In the 2018 RFI (83 FR 1005 through 1006, 1008), we sought public comment and information related to CLIA personnel requirements in the following areas: nursing degrees; physical science degrees; personnel competency assessment (CA); personnel training and experience; and non-traditional degrees. As we explained in the 2018 RFI, these are areas that the CDC, CMS, interested parties, and State agency surveyors identified as relevant to our efforts to update the CLIA personnel requirements to better reflect current knowledge, changes in the academic context, and advancements in laboratory testing.

We received approximately 8,700 comments in response to the 2018 RFI. In response to our questions about nursing degrees, the majority of commenters did not concur that nursing degrees were equivalent to a biological or chemical sciences degree. However, some interested parties suggested nursing degrees could be used as a separate qualifying degree for nonwaived testing personnel (TP). In response to our questions about physical science degrees as well as non-traditional degrees, interested parties commented that a physical science degree was hard to define. In considering how to evaluate physical science and other non-traditional degrees, some commenters recommended that we evaluate coursework taken using a semester-hour educational algorithm to qualify individuals for CLIA personnel positions. If an individual has the appropriate coursework without the traditional chemical or biological degree, the individual's educational coursework should be considered when determining whether that individual meets the educational requirements under CLIA. In response to the questions about competency assessment (CA), many commenters stated that individuals with an applicable associate degree should be permitted to perform CA on moderate complexity TP. Some commenters stated that required training should depend on the complexity of the testing to be performed and that all nonwaived testing should require training related to the individual's laboratory responsibilities. Several commenters also stated that any required training and experience should be in a CLIA-certified laboratory. Many commenters agreed that all training and experience should be documented; many noted that documentation from a former employer should be acceptable, assuming it provided specific details about the individual's job, training, and CA.

In addition to the 2018 RFI, we requested input from CLIAC for recommended changes to the CLIA personnel requirements found in subpart M—Personnel for Nonwaived Testing, §§ 493.1351 through 493.1495. In response, CLIAC established a workgroup that included laboratory experts, representatives from accreditation organizations (AOs), and government. The CLIAC Personnel Regulations Workgroup provided information and data to CLIAC for their deliberation in recommending to HHS to update the personnel regulations.[12] CLIAC made 12 recommendations at the April 2019 meeting to improve CLIA personnel regulations, including: (1) making biological science degrees acceptable for laboratory personnel and considering candidates with other degree backgrounds based on coursework; (2) removing the degree in physical science from the CLIA regulations due to its broadness; and (3) requiring personnel to have training and experience in their areas of responsibility.

After the April 2019 CLIAC meeting, CMS and CDC met to review and consider the recommendations along with the information provided in response to the 2018 RFI. The following CLIAC recommendations support proposals included in the July 2022 proposed rule:

- Coursework should be considered in meeting CLIA personnel requirements;
- Degree in physical science should be removed from CLIA regulations;
- All personnel should have appropriate training and experience;
- Remove the statement ''possess qualifications that are equivalent to those required for such certification'', as applicable;
- Laboratory experience should be clinical in nature;
- 20 credit hours of relevant continuing education should be required for all LDs except those certified by the American Board of Pathology, American Board of Osteopathic Pathology, and American Board of Dermatology;
- LDs should make at least two reasonably spaced onsite visits to the laboratories they direct annually. These visits should be documented;
- Modify CLIA requirements for technical consultants (TC) to include an associate degree and training and experience; and
- Modify the definition of mid-level practitioner to include registered nurse anesthetists and clinical nurse specialists.

Following this, CMS and CDC collaborated to develop a list of personnel regulation updates that we proposed in the July 2022 proposed rule.[13]

3. Alternative Sanctions for CoW Laboratories

As discussed in section III.C. of the proposed rule and this final rule, we proposed, and are finalizing, an amendment to § 493.1804(c)(1) to allow CMS to impose alternative sanctions on CoW laboratories, as appropriate. CoW laboratories are laboratories that only perform waived tests, that is, simple laboratory examinations and procedures that have an insignificant risk of an erroneous result. For example, a urine dipstick pregnancy test is a waived test. The current regulations state that we do not impose alternative sanctions on CoW laboratories because those laboratories are not inspected for compliance with condition-level requirements (§ 493.1804(c)(1)). However, while not subject to the biennial routine surveys, CoW laboratories are surveyed as a result of a complaint, and based on the complaint survey, may be found to be out of compliance with a condition-level requirement. In the absence of alternative sanctions, our only recourse in cases of compliance issues found at CoW laboratories is to apply principal sanctions (that is, revocation, suspension, or limitation of the CLIA certificate). We believe the ability to levy alternative sanctions (that is, civil money penalties, a directed plan of correction, a directed portion of a plan of correction, and onsite State monitoring) on CoW laboratories helps CMS ensure appropriate sanctions are applied to CoW laboratories, as in the case of other certificate types (certificate of PPM, CoR, CoC, CoA).

In addition, we believe that this finalized change will reduce burden on CoW laboratories. The ability to impose alternative sanctions will be particularly useful in instances in which we find PT referral violations. PT is the testing of unknown samples sent to a laboratory by an HHS-approved PT program to

[12] *https://www.cdc.gov/cliac/docs/summary/cliac0419_summary.pdf.*

[13] *https://www.federalregister.gov/documents/2022/07/26/2022-15300/clinical-laboratory-improvement-amendments-of-1988-clia-fees-histocompatibility-personnel-and.*

check the laboratory's ability to determine the correct testing results. This final rule amends the CoW regulations at § 493.1804(c)(1) to allow for the application of alternative sanctions where warranted, in addition to or in lieu of principal sanctions.

We note that while the regulatory text at § 493.1804(c)(1) currently specifies that CMS will not impose alternative sanctions on laboratories that have CoWs because those laboratories are not inspected for compliance with condition-level requirements, this distinction is not required by the applicable statute at 42 U.S.C. 263a(h). Therefore, as discussed in section III.C. of this final rule, we proposed to remove, and are finalizing the removal of, the current parenthetical at § 493.1804(c), which states ''(Except for a condition level deficiency under §§ 493.41 or 493.1100(a), CMS does not impose alternative sanctions on laboratories that have certificates of waiver because those laboratories are not routinely inspected for compliance with condition-level requirements.)''. We note that the language ''Except for a condition level deficiency under §§ 493.41 or 493.1100(a)'', which was inadvertently omitted from the discussion of this parenthetical in the July 2022 proposed rule, was added in the Medicare and Medicaid Programs, Clinical Laboratory Improvement Amendments (CLIA), and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency interim final rule with comment period, published in the September 2, 2020, **Federal Register** (85 FR 54820). This language was only effective during the PHE for COVID–19 which ended on May 11, 2023. Consistent with the finalized amendment to remove the current parenthetical at § 493.1804(c), this language will also be deleted as of the effective date of this final rule.

In responses received from the 2018 RFI, commenters noted that alternative sanctions instead of principal sanctions should be an option to create parity for all certificate types, especially in cases of PT referral. Further, commenters also stated that CoW laboratories should be held to the same standards and level of compliance as those that perform moderate complexity and/or high complexity testing.

II. Provisions for CLIA Fees

This final rule will amend subpart F—General Administration in the CLIA regulations. This section provides an overview of the proposed revisions to the CLIA fee requirements established by the February 1992 final rule. We also summarize and respond to the public comments on the July 2022 proposed rule and state our final policies.

A. Definitions of ''Replacement Certificate'' and ''Revised Certificate'' (§ 493.2)

At § 493.2, we proposed to add definitions for ''Replacement certificates'' and ''Revised certificates.'' After several years of experience and data analysis, it has been determined that the number of reissued certificates continues to be remarkable. Reissued certificates fall into two different categories: revised and replacement certificates. For further discussion please refer to section II.C. of this final rule. We proposed that these definitions be added to § 493.2 with the other definitions listed to allow clarity in the regulations where fees for replacement and revised certificates are being proposed.

We did not receive any public comments on the proposed definitions at § 493.2 of ''replacement certificate'' or ''revised certificate'' and are finalizing those definitions as proposed.

B. Changes to Certificate Fees (§ 493.638)

At § 493.638(a), we proposed to amend the regulatory language to clarify when a laboratory is required to pay a certificate fee and when the certificate is issued. We removed the listing of the individual certificates in the first paragraph of this section as all certificates go through the same process. The current regulation text specifies when a certificate fee is required, but we wish to clarify with more specific wording. The certificate fee is currently incurred when the original certificate is issued; when the certificate is subsequently renewed; if there is a change in certificate type requiring a new certificate to be issued; or if a lapsed certificate is reactivated with a gap in service and therefore reissued. The intent of the regulation is not changing. We believe adding this clarification would improve transparency concerning the requirement to pay certificate fees.

Specifically, at § 493.638(a)(1) for registration certificates, we proposed to remove the reference to the CoC because we believe the flat fee charged for a CoR and the temporary nature of the certificate require a separate section. We proposed to redesignate the fees associated with a CoC to a new provision at § 493.638(a)(5) to keep fee information relevant to the different certificate types separate, rather than referencing the certificate types together.

At § 493.638(a)(2) for CoW, we proposed to add the costs incurred by FDA to determine whether a test system meets the criteria for waived status, as specified at § 493.15(d). A CMS representative reviews an application for a CoW to determine whether the applicant has requested a CLIA certificate that covers the testing they have listed on the application that they will be performing. The cost of such a review is already part of the CoW fee. However, FDA must expend resources reviewing tests, procedures, and examinations to determine whether a test meets the criteria to be designated as waived. This expense is not currently captured in the fee for a CoW, and we proposed that it should be. HHS had delegated the responsibility to FDA for the review of test systems and assignment of complexity, including what is required by § 493.15(d). CMS compensates FDA out of the CLIA funds for this determination under the CMS–FDA MOU (IA19–23). CoW laboratories are restricted to using waived tests. We believe that the regulatory restrictions of test systems for the CoW laboratories and the CMS requirement to determine what tests can be performed in a CoW laboratory under § 493.15(d) require us to place this fee on the CoW laboratories alone. We believe the predicted increase in CoW laboratories will offset expected increases in the obligation to FDA for the continued process of review and categorization of tests as waived.

We proposed to make editorial changes to clarify the current provision § 493.638(b) that describes certificate fee amounts. We proposed to separate this section into four shorter paragraphs designated as § 493.638(b)(1) through (4). Proposed § 493.638(b)(1) stated that CMS will publish a notice in the **Federal Register** when assessed fees are adjusted in accordance with § 493.680. This section also includes a brief discussion of the basis for certificate fees as set forth in § 493.638(c). Proposed § 493.638(b)(2) stated that certificate fees would be collected at least biennially. Certificate fees may be assessed more frequently than every 2 years if the laboratory changes its certificate type. Proposed § 493.638(b)(3) stated how fees would be determined and proposed § 493.638(b)(4) stated that CMS would notify the laboratories when the fees are due and the fee amount. This currently takes place in the form of a fee coupon sent through U.S. Mail by the Billing and Certificate Issuance contractor.

We also proposed to move the regulatory text currently found at

§ 493.643(c)(1) through (3) to a new provision at § 493.638(c) to align the provisions more closely for laboratory schedules and specialties with the related provisions concerning certificate fees. Our intent is to refer back to this provision when the compliance fees are discussed. In addition to redesignating this regulatory text, we proposed making minor changes to clarify the regulatory text related to specialties of service before those specialties are explained at § 493.643(c)(3).

At the proposed new § 493.638(c)(3), we proposed to redesignate the regulatory text currently at § 493.643(c)(1) with changes. We believe that the separation of Schedule A into two parts at § 493.643(c)(1)(i)(A) and (B) was confusing, and we proposed listing them as separate schedules. The proposed text in the new provision § 493.638(c)(3) included § 493.638(c)(3)(i) through (xi). At § 493.638(c)(3)(i), we proposed describing the low volume schedule as Schedule V to differentiate it from Schedule A, proposed at § 493.638(c)(3)(ii). Current data processing system requirements have been built to refer to the low volume A schedule laboratories as Schedule V and will continue with the new data system.

We received public comments on these proposals. The following is a summary of the public comments we received and our responses.

Comment: Several commenters supported the proposed increase in fees, including the fees for replacement certificates. However, several other commenters expressed concerns about the fee increase and new fees, specifically, the potential impact on rural areas or smaller laboratories, including private physician office laboratories. Commenters stated laboratories in this defined population may need to limit, reduce or discontinue services, which would negatively impact the populations served. Commenters stated many laboratories already experience hardship with growing labor costs, combined with shortages and increased costs of supplies and that raising CLIA fees presents another hardship. Several commenters expressed concerns about raising the CLIA laboratory fees during a time when CMS has made cuts to laboratory test reimbursement under the Protecting Access to Medicare Act (PAMA). The commenters stated that broad increases in regulatory costs may adversely impact the ability to provide clinical laboratory services, particularly in resource-limited settings.

Response: As a user-fee funded program, CLIA must collect fees to cover the cost of implementing the program. However, the existing fee collections are not sufficient to cover total costs of laboratory oversight. The CLIA fees are structured on annual test volume and number of specialties so that smaller (lower annual test volume) laboratories' fees are less than larger (higher annual test volume) laboratories. The fee increase allows us to fund and sustain the CLIA program to ensure oversight of laboratory testing. We note that reimbursement rates are outside the scope of the rule, are set by statute, and are not related to raising the CLIA fees.

Comment: Several commenters requested CMS provide transparency in how the 20 percent increase in 2019 stabilized the CLIA program and publish additional detail related to the CLIA total program costs.

Response: We thank the commenters for these comments. The funds collected in the CLIA program must maintain funding levels to sustain the program. The 2019 20 percent across the board increase was used to shore up the program facing crucial deficiencies at that time. The increase implemented in this final rule is meant to stabilize the program so that adjustments based on inflation will apply automatically. While we proposed a 20 percent across the board increase, based upon our analysis in section I. of this final rule and Table 3, we are instead finalizing an 18 percent across the board increase based on consideration of updated inflation assumptions, laboratory counts, workload estimates and available funds. CMS reviewed updated estimates of program spending, user fee collections, carryover, and inflation. As displayed in Table 3, we found that increases in actual carryover, actual collections, new and increased fee collections and estimated changes in CPI–U, when applied to actual program obligations, allowed CMS to assess a lower across-the-board inflation factor to the existing user fees and still meet planned carryover targets.

Comment: A commenter stated that the activities associated with processing CLIA certificates of waiver at the State Agency should be allocated more effectively.

Response: We appreciate the commenter's input, but this is outside the scope of the rule. The fees from all collections are used to support the whole of the CLIA program including activities for waived laboratories and the FDA's role in categorizing tests and test systems as waived.

Comment: Several commenters expressed concerns that the fee increase will negatively impact the small office laboratories and private physician laboratories as these types of laboratories will not be profitable enough to offer services or will severely limit services. Commenters further expressed concerns that most of these laboratories are still being negatively impacted by the public health emergency and requested that CMS consider suspending the fee increase for these laboratory types for at least 2 years.

Response: The CLIA regulations were framed to establish quality standards for all laboratories regardless of size or facility type. As such, collection of fees from all types of laboratories is necessary in order for the program to be self-funded as mandated by statute. As previously noted, the CLIA fee schedule is structured so that the lowest volume laboratories pay the lowest CLIA fees. We appreciate the commenters sharing these concerns, but believe it is necessary to finalize the proposed fee increase at this time in order to sustain the CLIA program.

After consideration of the comments received, we are finalizing the proposed changes to § 493.638 without modification. As discussed previously, after recalculating the needs of the program using updated data, we are finalizing an across the board increase of 18 percent that will be applied to all fees, except for replacement and revised certificates.

C. Changes to Fees for Revised and Replacement Certificates (§ 493.639)

At § 493.639, we proposed to revise the current section heading (''Fee for revised certificate'') to read as ''Fee for revised and replacement certificates'' to match the contents of the section as amended to include both revised certificates and replacement certificates. We proposed to define and explain revised and replacement certificates in section II.A. of the proposed rule. In the proposed provision at § 493.639, we explained the fees associated with each type.

At § 493.639(a), we proposed removing the reference to registration certificates as the section applies to all CLIA certificate types under the statutes. We also proposed to amend the circumstances in which a laboratory may request a revised certificate to include changes to laboratory name and location, LD, or services offered (specialties and subspecialties). We proposed the fee be based on the national average cost to issue the revised certificate. However, due to differing amounts of work required per certificate type, the fee is not the same for all certificate types. Please see Table 6.

We determined the time and resources required to enter changes to laboratory demographics, review of specialties and subspecialties, and review of LD qualifications using an average of the State survey agencies' calculated unit hourly cost. The State unit hourly cost is determined by the CLIA budget office and is based on a formula of total State costs divided by the total paid hours. The total State costs are reported to CMS by the State survey agencies and include staff salaries as determined by each State's civil service pay scale, fringe benefits, travel costs, and other costs such as office supplies, computers containing software required to perform and report a CLIA survey, etc. The total staff year hours are determined by multiplying the number of full-time employees (FTE) by 1600 hours, representing the productive work year.

The time and resources for State agencies to enter demographic changes are less than those where the qualifications of the LD or services need to be reviewed to ensure CLIA personnel requirements are met. Review of LD qualifications applies to laboratories holding a CoC, a certificate for PPM, or CoR.

AOs are responsible for reviewing CoA LD qualifications, and the AO is also responsible for reviewing the addition of specialties and subspecialties for the CoA laboratory. As such, State agency staff are not responsible for reviewing LD qualifications or changes in specialties/subspecialties for laboratories with a CoA; however, they are responsible for processing the other demographic change requests for CoA laboratories. Therefore, a revised certificate for a CoA laboratory does not include the cost to review the qualifications of LDs, nor does it include the adding or deleting of specialties or subspecialties.

For a CoC, a change in services (adding or deleting a specialty or subspecialty) does not include review to determine compliance with the regulations for services added; however, the entry or deletion of specialty or subspecialty changes requires State agency personnel time and resources.

CLIA personnel requirements are not required for laboratories with a CoW, nor are there specialty or subspecialty requirements. Therefore, the time and resources required to enter requested demographic changes for CoW laboratories are less than for other certificate types. Please see the section below for the calculations used to determine these fee amounts.

We proposed the following fees for issuing revised certificates:

TABLE 6: CMS Proposed Fee for Issuance of Revised Certificate

Certificate Type	Fee
CoW	$95.00
CoA	$95.00
CoR	$150.00
CoC	$150.00
PPM	$150.00

The revised certificate fee would be paid prior to the issuance of the revised certificate.

At § 493.639(a)(1), we proposed a new provision explaining that the addition of services (that is, specialties/subspecialties) for laboratories with a CoC may result in an additional fee for purposes of determination of compliance if added services require an inspection. That addition of the specialties inspection fee is described in a new provision at § 493.643(d)(2).

We proposed to delete the current provisions at § 493.639(b)(1) and (2), which provide information on fees for issuing a revised certificate and scenarios that describe changes that may require a change in certificate. We proposed to replace them with a new provision at § 493.639(b) that outlines fees for issuing a replacement certificate. We believe the current provisions are confusing as written as is the location of the provisions in the regulations.

At the new provision § 493.639(b), we proposed a fee for issuance of replacement certificates as discussed in section II.A. of the proposed rule. The proposed requirement must account for the time and resources required to issue a replacement certificate when requested. Historically, replacement certificates have been issued without additional fees when a laboratory loses or destroys its current certificate. As discussed in the proposed rule, we have determined that the actual cost of issuing a replacement certificate is $75.00. A replacement certificate is one where no changes are being requested. The fee would be paid prior to the issuance of the replacement certificate.

The initial calculations used to determine the proposed fee amounts for replacement certificates, and revised certificates were based on the time, and the average State unit costs for 2019 when these fees were set. When these calculations were made, the national average unit hourly cost in 2019 was $72.06. It was determined that it took State agency personnel approximately 45 minutes to receive, review, and enter a request for a replacement certificate and another 15 minutes to print and mail the certificate. Using these estimates, the cost of the replacement certificate is calculated to cost the CLIA program $75.00 currently.

Furthermore, CMS determined that additional State agency resources are expended when issuing revised certificates as follows:

- An additional 15–20 minutes to review and enter requested demographic changes or $20.00 for all certificate types.
- An additional 45 minutes to review and enter requested laboratory director changes or specialty changes for $55.00 for revised CoRs, CoCs, and PPMs.

These additional costs are therefore reflected in the proposed fees for issuing revised certificates. (See Table 6)

We received public comments on these proposals. The following is a summary of the public comments we received and our response.

Comment: Several commenters suggested CMS establish a process that would allow a laboratory to print its own certificates, rather than having to request and pay a replacement certificate fee as proposed. The commenters asserted that the established process of mailing and relying on mail delivery service is outdated and antiquated and that often the laboratory may not receive a copy of the certificate, due to mail delivery interruptions.

Response: We thank the commenters for this suggestion. As of March 2023,

CMS began issuing a link to electronic certificates so laboratories could print their own certificate.

After consideration of the comments received, we are finalizing the proposed changes to § 493.639 without modification.

D. Changes to Fees Applicable to Laboratories Issued a CoC (§ 493.643)

At § 493.643, we proposed renaming the section heading ''Fee for determination of program compliance'' to ''Additional fees applicable to laboratories issued a certificate of compliance'' for clarification.

We proposed adding language at § 493.643(b) to describe the costs included in the fee for routine inspections to increase transparency. We proposed deleting the second sentence of § 493.643(b) in consideration of a two-part biennial fee increase as discussed under section II.H. (§ 493.680) of the proposed rule and this final rule. For clarity, we proposed to redesignate the third sentence of the current provision at § 493.643(b) as § 493.643(c).

At the new provision § 493.643(c)(1), we proposed that the inspection fee will be based on the schedules of the laboratories as defined in the new provision under § 493.638(c)(3). The fee amounts assigned to the schedules in the February 1992 final rule were based on an estimated number of hours to perform a survey of a laboratory with the scope and volume associated with each schedule multiplied by an estimated 1992 hourly rate for a surveyor of $35.00. The established hourly rate of $35.00 was intended to be used as a baseline and then revised after actual data were collected and experience gained (57 FR 7193). In 1992 it was anticipated that the universe of regulated laboratories would be much greater than those regulated prior to the implementation of CLIA '88.

The hourly rate for performing laboratory surveys is recalculated by CMS for each State annually to determine the CLIA obligation to support the State survey agencies but has not been used to increase CLIA fees on an ongoing basis. The national average hourly rate in 2023 is $108.78, to reflect updated data. A description of the national average hourly rate calculation is provided in section II.C. of the proposed rule.

Extensive data collected over time now enables us to better estimate the number of hours it takes for a surveyor to perform an inspection of a laboratory within each schedule. Such estimates are primarily driven by the scope and volume of tests run by the laboratory and the laboratory's compliance with the CLIA regulations. A laboratory with a high-test volume and multiple specialties may have processes and practices that allow it to meet and exceed CLIA regulations as they operate with a high degree of quality and efficiency while ensuring reported results are accurate and timely to provide optimum patient care. The surveyor will likely spend less time on inspecting that laboratory. In contrast, if a laboratory with a small test volume and few specialties does not have processes and practices that allow it to operate with the same high degree of quality and efficiency, such a laboratory is likely not to meet the CLIA requirements. Such laboratories may be reporting test results that may not be accurate and reliable. While the test volume may be low, the surveyor will likely spend additional time surveying such laboratories due to the less-than-optimal operations and processes.

Conversely, the number of hours needed to survey a large laboratory with poor compliance history could be quite large. The surveyor would spend more time in this laboratory, and given the size and poor compliance history, the surveyor would review the prior survey deficiencies to ensure the laboratory's monitors put into place have corrected the deficiency. In contrast, a surveyor may not need to spend as many hours to survey a laboratory with lower test volume and specialties and a favorable compliance history. Taking each scenario into account, we believe the average number of hours a surveyor spends in each laboratory reflects the universe of laboratories within each schedule. Thus, as we explained in the proposed rule, we will not be changing the differences between the amounts of the fees within the compliance fee schedules relative to each other. They will remain in their relative amounts and be increased across the board by the same percentage in the proposed two-part fee increase (section II.H. (§ 493.680) of the proposed rule and this final rule).

Table 7 illustrates the different scenarios mentioned previously in the proposed rule and this final rule and how the number of hours spent on the survey vary based on both the size (the schedule) of the laboratory and poor compliance with the CLIA regulations. Poor compliance is being defined for this illustration as a laboratory with at least one condition-level deficiency cited during a survey. For information about condition-level deficiencies, please see the CLIA website for the Interpretive Guidelines for Laboratories, Appendix C: Interpretive Guidelines.[14]

[14] *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107ap_c_lab.pdf.*

TABLE 7: Survey Hours with Condition-Level Deficiencies Cited vs. Not Cited by Schedule Code

	Condition Level Deficiencies Not Cited		Condition Level Deficiencies Cited	
Schedule code of laboratories that were surveyed*	Number of laboratories**	Range of hours required to perform the individual surveys and the average (avg) number hours**	Number of laboratories**	Range of hours required to perform the individual surveys and the average (avg) number of hours**
V-A	3,446	4 – 69 (avg: 12)	661	5 – 143 (avg: 18)
B-C	1,328	4 – 69 (avg: 13)	320	7 – 123 (avg: 19)
D-E	972	4 – 79 (avg: 15)	261	6 – 201 (avg: 23)
F-G	727	5 - 165 (avg: 18)	192	6 – 378 (avg: 30)
H-I	935	5 – 284 (avg: 21)	279	7 – 497 (avg: 41)
J	110	8 – 213 (avg: 32)	23	8 – 378 (avg: 75)

*For a description of the schedules see the section of this document with the proposed amendments to 42 CFR chapter IV, specifically provision § 493.638(c). The schedules have been grouped as two schedules together to keep the size of the table to a minimum. We did not propose to change the schedules this way.

**The data comes from the SAS Viya system for surveys completed between 10-01-2017 and 09-30-2019 with condition-level deficiencies not cited versus condition level deficiencies cited and separated by schedule codes.

As illustrated in Table 7, survey hours in small laboratories without condition level deficiencies averaged 12 hours. In contrast, survey hours in small (schedules V–A) laboratories with condition level deficiencies averaged 18 hours. In the largest (schedule J) laboratories, survey hours differed from an average of 32 hours spent in laboratories without condition level deficiencies compared to 75 hours in those laboratories that had condition level deficiencies cited.

The February 1992 final rule did not consider other costs involved in the inspection process, such as continuous training of the State surveyors and monitoring of the State agency program processes by the CMS Locations (Regional Offices). The CLIA program has created and continuously updates periodic training for surveyors through online training modules, onsite meetings, and conference calls.

The surveyors are individually monitored with a Federal Monitoring Survey (FMS) process where CMS location (Regional Office) Federal surveyors observe the individual State surveyor on a survey or perform a survey of the same laboratory after the State surveyor has completed their survey to confirm that the State surveyor is competent and following the prescribed survey process. The CMS locations (Regional Offices) also perform an annual State Agency Performance Review (SAPR) for each State survey agency, including a review of the State survey agency's training processes and monitoring processes for their State surveyors. This includes a review of the deficiency reports State surveyors have sent to laboratories to determine that the surveyor is following the program's principles of documentation and the proper survey process.

There are also costs to the program to maintain a computerized system for entering inspection findings and compliance monitoring, including proficiency testing. The computer system also allows the CMS locations to run reports to monitor the inspections entered by the State surveyors.

The compliance fees have historically been based on the costs to the CLIA program for the State agencies. These aforementioned activities are obligations outside of the State survey agency annual budgets. We therefore proposed that inspection fees for laboratories in each schedule and State will no longer be determined solely by the estimated hours spent on a survey of a laboratory within each schedule nor by the surveyor hourly rate of $35.00 established in 1992.

We believe that the compliance fees currently set within the schedules should continue to be used but that additional fees, as previously described, should be added to the regulatory scheme. All fees would be increased biennially following the biennial two-part fee increase as proposed in the proposed rule in § 493.680.

We believe we are authorized to calculate these fees per laboratory schedule (or group) even though the fees will no longer be determined solely by the estimated hours spent on a survey of a laboratory within each schedule nor by the 1992 surveyor hourly rate of $35.00 based on section 353(m)(3)(C) of the PHSA, which states that, fees shall vary by group or classification of laboratory, based on such considerations as the Secretary determines are relevant, which may include the dollar volume and scope of the testing being performed by the laboratories. As discussed in the proposed rule, we believe our proposals are within the bounds of our authority under the PHSA.

At § 493.643(c)(2), we proposed to redesignate language from the current § 493.643(b) which states the fees are assessed and payable biennially. We stated that we believe this will support the two-part fee increase proposed in the proposed rule and described in § 493.680.

At the new provision § 493.643(c)(3), we proposed that the fee amount would be the amount applicable to a given laboratory increase listed in the most recent published CLIA fee increase notice in the **Federal Register**.

We proposed to redesignate current § 493.643(d)(1) and (2) where additional fees for CoC laboratories are discussed as § 493.643(d)(2) and (3) and to redesignate the fourth and fifth sentences of current provision § 493.643(b) where an additional fee for a follow-up survey on a CoC laboratory is discussed as a new provision at § 493.643(d)(1). We believe the discussion of additional fees for CoC laboratories should be grouped together.

We proposed to move the current regulatory text at § 493.643(d)(2) to § 493.643(d)(3) with no changes. Current regulation allows additional fees to be assessed for substantiated complaints; however, this has not been implemented. The proposed rule would

implement fees for substantiated complaints, meaning those complaints where the allegations against the laboratory were found to be true by CMS. We believe implementing the fee for substantiated complaints would cover the costs required to perform such a survey, including documenting the deficiencies found to be violated, preparing a report for the laboratory, and review of the laboratory's plan of correction and monitoring their correction. The fee was proposed to be limited to the cost of the actual time and resources required for these activities.

At new provision § 493.643(d)(4), we proposed to establish an additional fee for CoC laboratories that are found to have unsuccessful PT through a PT desk review. Current policy requires the review of PT performance every 30–45 days for each laboratory with a CoC that performs testing and is enrolled in PT for an analyte or test included in subpart I. Cases of unsuccessful PT performance require a PT desk review to confirm. Upon confirmation, the laboratory is notified of its regulatory requirement to investigate and correct the unsuccessful PT performance. Currently, such PT desk reviews do not generate an additional fee; however, conducting the desk review requires surveyor time and resources. We believe this new fee would cover the costs of the desk review, including documenting the deficiencies found to be violated, preparing a report for the laboratory, and reviewing the laboratory's plan of correction and monitoring their correction. The proposed fee is to be limited to the cost of the actual time and resources required for these activities. We stated in the proposed rule that only laboratories with unsuccessful PT performance would be impacted if this rule is finalized.

The fees described in § 493.643(d) must be paid, or HHS will revoke the laboratory's CoC.

We did not receive public comments on the proposed changes to § 493.643 and are finalizing as proposed.

E. Changes to Additional Fees Applicable to Laboratories Issued a CoA, CoW, or Certificate for PPM Procedures (§ 493.645)

At § 493.645, we proposed to change the current section heading (''Additional fee(s) applicable to approved State laboratory programs and laboratories issued a certificate of accreditation, certificate of waiver, or certificate for PPM procedures'') to clarify the contents of the section as amended. The proposed title was ''Additional fees applicable to laboratories issued a certificate of accreditation, certificate of waiver, or certificate for PPM procedures.''

We proposed to move in its entirety the regulatory text regarding the fee we charge State laboratory programs for costs related to their CLIA-exempt laboratories in § 493.645(a)(1) through (3) to § 493.649(a)(1) through (3). We believe the fees for approved State laboratory programs should be listed separately from the other CLIA-certified laboratories in the regulations. A State laboratory program is a laboratory program that HHS approves as exempt due to the State requirements being equal to or more stringent than the CLIA requirements. Under such programs, the State provides regulatory oversight of its laboratories in lieu of such laboratories being regulated by HHS. HHS approves and monitors such State laboratory programs to ensure that the standards of the State laboratory programs are and remain at least as stringent as the CLIA regulations. HHS does not impose fees on laboratories covered by these programs but charges a fee to the program as described in the new provision at § 493.649.

We proposed making editorial corrections to the references of §§ 493.645(a) and 493.646 noted in §§ 493.557(b)(4) and 493.575(i) and replacing those references with §§ 493.649(a) and 493.655(b). The requirements previously included at §§ 493.645(a) and 493.646(b) governing applicable fees were proposed to be redesignated as § 493.649(a) and new § 493.655(b).

We further proposed redesignating current § 493.645(b)(1) and (2) regarding the payment of inspection fees as new § 493.645(a)(1) and (2). We proposed new § 493.645(a)(1) to clarify the amount accredited laboratories pay for their inspection (validation survey) fees by removing the last sentence of the current regulatory text, which reads that these costs are the same as those that are incurred when inspecting nonaccredited laboratories. We believe this does not fully explain how the fee is determined. This fee is based on fees that CoC laboratories pay for compliance inspections; however, an accredited laboratory is only assessed 5 percent of the fee a CoC laboratory pays because only 5 percent of CoA laboratories are inspected (undergo a validation survey) annually. For example, a CoC laboratory classified as ''schedule D'' currently pays an average biennial compliance fee of $2,336.00. The accredited laboratory classified as ''schedule D'' would currently pay an average biennial inspection (validation survey) fee of $117.00.

At new § 493.645(a)(2), we proposed redesignating the provision from current § 493.645(b)(2), with no changes. This provision established an additional fee if a laboratory issued a CoA were to be inspected and follow-up visits were necessary because of identified deficiencies. Historically this fee had not been implemented due to technical difficulties described previously in the proposed rule. We proposed that it be implemented. As stated in the current regulatory text, the additional fee to cover the cost of these follow-up visits would be based on the actual resources and time necessary to perform the follow-up visits. Also, as stated in the regulatory text, HHS would revoke the laboratory's CoA for failure to pay the fee.

At new § 493.645(b), we proposed redesignating the provision from current § 493.645(c). This provision established a fee for substantiated complaint surveys, those in which the allegations against the laboratory were found to be true, on CoA, CoW, or certificate for PPM procedures laboratories. Historically, this fee has not been implemented. We believe implementing the fee for substantiated complaints would cover the costs required to perform such a survey, including documenting the deficiencies found to be violated, preparing a report for the laboratory, and review of the laboratory's plan of correction and monitoring their correction. The fee is limited to the actual time and resources required for these activities.

We did not receive public comments on the proposed changes to §§ 493.557, 493.575, and 493.645 and are finalizing as proposed.

F. Changes to Additional Fees Applicable to Approved State Laboratory Programs (§ 493.649)

At § 493.649, we proposed to delete the current language in its entirety and replace it with language from § 493.645(a)(1) through (3). We stated in the proposed rule that the current provision at § 493.649 would no longer be needed as the methodology for determining inspection fees because the proposed rule was not based on a surveyor hourly rate. At new § 493.649, we proposed revising the current section heading (''Methodology for determining fee amount'') to give a clear meaning of the contents of the section as amended. The proposed title was ''Additional fees applicable to approved State laboratory programs.'' We proposed replacing the current language with current provisions § 493.645(a)(1) through (3) with minor changes (removing ''costs of'' from current

493.469(a)(3)). The provisions at § 493.645(a)(1) through (3) outline the fees applicable to approved State laboratory programs and have been comingled with the provision that outlines the fees for accredited PPM and CoW laboratories. We believe separating this provision from the other laboratory certificate types will allow for improved readability and understanding.

We did not receive public comments on the proposed changes at § 493.649 and are finalizing as proposed.

G. Changes to Payment of Fees (§§ 493.646 and 493.655)

At § 493.646, we proposed redesignating the current provision with minor changes corresponding to the validation survey cost as new § 493.655 and including a reference to § 493.563 that contains the validation inspection information. We believe this provision which outlines the payment of fees, is better placed after discussions of the different types of fees.

We proposed redesignating § 493.646(a) and (b) where the payment of fees is discussed to new provisions at § 493.655(a) and (b) with a minor change referencing approved State laboratory programs instead of State-exempt laboratories. The State program pays CMS, not the individual laboratories.

We did not receive public comments on the proposed changes at §§ 493.646 and 493.655 and are finalizing as proposed.

H. Methodology for Determining the Biennial Fee Increase (§ 493.680)

At new provision § 493.680, we proposed a biennial two-part fee increase, which would be calculated as described in section I.B. of the proposed rule and published as a notice with a comment period at least biennially. Should the off-year of the biennial increase result in unexpected program obligations, CMS may need to calculate an additional fee increase based on either the CPI–U or difference in obligations and total collected fees or a combination of both. Any unexpected program obligations that are identified during the off-year would be incorporated into the biennial increase. All fees, existing and proposed, mentioned in the proposed rule would also be subject to the biennial two-part fee increase.

We did not receive public comments on proposed § 493.680 and are finalizing as proposed.

III. Provisions for CLIA Requirements for Histocompatibility, Personnel, and Alternative Sanctions for CoW Laboratories

This final rule amends subpart K—Quality System for Nonwaived Testing, subpart M—Personnel for Nonwaived Testing, and subpart R—Enforcement Procedures in the CLIA regulations. This section provides an overview of the proposed revisions to the CLIA requirements for histocompatibility, personnel, and application of alternative sanctions for CoW laboratories originally established by the February 1992 final rule with comment period (57 FR 7002), subsequently modified in 1995 [15] and 2003,[16] and currently specified in subpart A—General Provisions, subpart K—Quality System for Nonwaived Testing, subpart M—Personnel for Nonwaived Testing, and subpart R—Enforcement Procedures. We also summarize and respond to comments on the July 2022 proposed rule in this section and summarize the final actions for each of the new or revised sections of the regulations.

We received 20,574 public comments in response to the July 2022 proposed rule. The commenters represented individuals, laboratory accreditation organizations, laboratory professional organizations, government agencies, healthcare organizations, and businesses, including in vitro diagnostics manufacturers. The majority of the comments were a standard ''form letter'' opposing the proposal to include nursing degrees in the qualifications for high complexity testing personnel. In addition to the duplicate form letters, we received over 750 comments related to the inclusion of nursing degrees for moderate and high testing personnel qualifications.

A. Changes to Histocompatibility Requirements

In the proposed rule, we proposed to amend the histocompatibility regulations under CLIA by removing obsolete regulations and removing requirements that are also imposed under the general requirements. We also proposed to update the histocompatibility regulations to incorporate current practices and technological changes in Human leukocyte antigen (HLA) typing, antibody screening and identification, crossmatching and transplantation.

[15] 60 FR 20047, April 24, 1995 (*https://www.govinfo.gov/content/pkg/FR-1995-04-24/pdf/95-9953.pdf#page=13*).

[16] 68 FR 3640, January 24, 2003 (*https://www.govinfo.gov/content/pkg/FR-2003-01-24/pdf/03-1230.pdf*).

1. General, Human leukocyte antigen (HLA) Typing, Disease-Associated Studies, and Antibody Screening and Identification (§ 493.1278(a) through (d))

At § 493.1278(a)(1), we proposed to amend the requirement by changing ''an audible alarms system'' to ''a continuous monitoring and alert system'' because this allows the laboratories more flexibility in determining the best way to monitor refrigerator temperatures. It is very important to monitor temperatures continuously, so that recipient and donor specimens and reagents are stored at the appropriate temperature to ensure accurate and reliable testing.

At § 493.1278(a)(2), we proposed to modify the requirement by expanding the regulatory language to include that the laboratory must establish and follow written policies and procedures for the storage and retention of patient specimens based on the specific type of specimen because the type and duration of specimen storage are equally important as ease of retrieval. We are retaining the requirement that stored specimens must be easily retrievable.

At § 493.1278(a)(3), we proposed deleting the labeling requirement for in-house prepared typing sera reagent. If a laboratory is performing histocompatibility testing, this requirement under the general reagent labeling requirements for all test systems must be met under § 493.1252(c) and, therefore, is duplicative.

At § 493.1278(a)(4), we proposed to revise this requirement by removing the examples (that is, antibodies, antibody-coated particles, or complement) to clarify that these technologies, as well as current and future technologies, are allowed for the isolation of lymphocytes or lymphocyte subsets. We also proposed clarifying the requirement by adding ''identification'' of lymphocytes, or lymphocyte subsets. In this type of testing, lymphocytes can be isolated, but the subsets (B and T cells) are identified rather than isolated. Due to the proposed changes to § 493.1278(a)(3), we also proposed to redesignate § 493.1278(a)(4) as revised to § 493.1278(a)(3).

We proposed the current requirement at § 493.1278(a)(5) would be redesignated as § 493.1278(a)(4). This requirement remains unchanged.

At § 493.1278(b)(1) through (3), we proposed deleting these requirements pertaining to establishing HLA typing procedures. The requirement that the laboratory must establish and have written procedures that ensure quality

test results are already addressed by the general requirements for all test systems under current § 493.1445(e)(1) and (e)(3)(i) and revision at § 493.1278(f), respectively, and therefore, are duplicative.

The July 2022 proposed rule inadvertently omitted a technical change at proposed redesignated § 493.1278(b)(1) to reflect the current name of the World Health Organization (WHO) committee that determines HLA nomenclature, the ''Nomenclature Committee for Factors of the HLA System.'' The finalized regulation text at newly redesignated § 493.1278(b)(1) incorporates this change and is shown in its entirety in the final regulatory text.

At § 493.1278(b), we proposed to redesignate the provisions at paragraph (b)(4) to paragraph (b)(1). At newly redesignated paragraph (b)(1), we proposed deleting the language that states potential new antigens not yet approved by this committee must have a designation that cannot be confused with WHO terminology because new alleles are approved monthly, which makes this requirement obsolete.

At § 493.1278(b)(5)(i) through (iv), we proposed deleting the requirements for preparation of cells or cellular extracts, selecting typing reagents, ensuring that reagents used for typing are adequate, and assignment of HLA antigens as they are already addressed by the general requirements for all test systems under §§ 493.1445(e)(1) and (e)(3)(i), 493.1251, and 493.1252, and therefore, are duplicative.

At § 493.1278(b)(5)(v), we proposed to modify the requirement to add ''allele'' and delete the ''re'' prefix in the word ''retyping'' in this paragraph and to redesignate the provisions at paragraph (b)(5)(v) to paragraph (b)(2). We proposed inserting ''allele'' because the regulation only has antigen typing, but there is typing done at the allele level. We proposed deleting the ''re'' prefix to remove redundancy under the proposed revision at § 493.1278(b)(2) which requires the laboratory to have written criteria to define the frequency for performing typing.

At § 493.1278(b)(6)(i) through (iii), we proposed deleting requirements for HLA typing control materials procedures as they are addressed by the general requirements regarding quality control materials and procedures for all test systems under § 493.1256(a) through (d) and (f) through (h), and therefore, are duplicative.

At § 493.1278(c), we proposed deleting this requirement for control procedures and materials regarding disease related studies because this is addressed by the general requirements for all test systems under §§ 493.1256(d) and 493.1451(b)(4), and therefore, is duplicative.

At § 493.1278(d), we proposed changing the name of this section from ''Antibody Screening'' to ''Antibody Screening and Identification'' for clarification as both processes apply to histocompatibility testing. The provisions covered under this section apply to both screening and identification. We proposed moving § 493.1278(d) as revised to § 493.1278(c).

At § 493.1278(d)(1) through (3) and (5) through (7), we proposed deleting these requirements for antibody screening laboratory procedures as they are addressed by the general requirements for all test systems under §§ 493.1445(e)(1) and (e)(3)(i), 493.1251, 493.1252, and 493.1256, and therefore, are duplicative.

We received public comments on these proposals at § 493.1278(a) through (d). The following is a summary of the public comments we received and our responses.

Comment: A commenter supported the modification under § 493.1278(a)(1) requiring the use of a continuous monitoring system and alert system to monitor the storage temperature of specimens but added that this may result in an additional burden for smaller laboratories with limited funds.

Response: Many continuous monitoring systems have alerts built into the system. Laboratories can also develop policies and procedures for an alert system built upon the results of the continuous monitoring system. We believe that the risk associated with the incorrect storage temperature of specimens and reagents warrants the requirement for an alert system.

Comment: A commenter proposed new language for existing standards at § 493.1278(d)(1) to ''use a technique that detects HLA-specific antibody that is equivalent or superior to the solid phase assays'' and § 493.1278(d)(3) to ''use a panel composition that contains all major HLA specificities'' to remain in alignment with the United Network for Organ Sharing (UNOS) requirements.

Response: In the proposed rule, we proposed to delete § 493.1278(d)(1) and (d)(3) as we believe they are addressed by the general requirements for all test systems under §§ 493.1445(e)(1) and (e)(3)(i), 493.1251, 493.1252, and 493.1256. LDs can choose to implement UNOS requirements as part of their responsibilities indicated under § 493.1445(e)(3)(i). Therefore, we are not making any language change and are finalizing the proposed deletion of § 493.1278(d)(1) and (d)(3).

Comment: A commenter suggested the inclusion of current § 493.1278(d)(5) ''have available and follow a written policy consistent with clinical transplant protocols for the frequency of screening potential transplant beneficiary sera for preformed HLA-specific antibodies.''

Response: We believe the general requirements for all test systems under § 493.1251 address the requirement for laboratories to have available and follow written policies. Therefore, we are finalizing the proposed deletion of § 493.1278(d)(5).

Comment: Several commenters suggested the removal of the word ''serologic'' in the proposed language for crossmatching at § 493.1278(d)(2)(iv) to account for allele-specific antibody detection. Another commenter stated that serologic typing is insufficient for current clinical histocompatibility testing due to its many limitations, including low specificity at certain loci and the potential for certain false negative results, and suggested changing the language to ''typing of the donor by molecular methods at the serologic split antigen equivalent.''

Response: We agree with the commenters that removing ''serologic'' will maintain flexibility with the evolution of testing practices. We are not specifying molecular methods, but instead, are modifying our proposed revisions to remove reference to the ''serologic'' level at revised § 493.1278(d)(2)(iv).

We received no comments on proposed § 493.1278(a)(2) through (4) and (c) and are finalizing these provisions as proposed.

After consideration of the comments received, we are finalizing the proposed changes at § 493.1278(a) through (d), with the following modifications to the proposed revisions at (b)(1) and (d)(2)(iv):

- To update the regulation at redesignated § 493.1278(b)(1) to incorporate the revised name of the World Health Organization (WHO) committee that determines HLA nomenclature, ''Nomenclature Committee for Factors of the HLA System.''
- To finalize the proposed revisions at § 493.1278(d)(2)(iv) with modification, to remove ''at the serologic level''.

2. Crossmatching and Transplantation (§ 493.1278(e) and (f))

At § 493.1278(e)(1) through (3), we proposed removing these three requirements regarding the laboratory

having crossmatch procedures and controls as we believe the provisions to be removed are addressed by the general requirements for all test systems under §§ 493.1445(e)(1), 493.1251, 493.1256, and 493.1451(b)(4), and therefore, are duplicative.

Since 1992, there have been important advances in the field of transplantation and histocompatibility. Based on comments received in response to the 2018 RFI and interested parties and CLIAC input, we understand the current regulations at § 493.1278 do not reflect the standard practice for laboratories performing testing in the specialty of histocompatibility and are viewed by the transplantation community as a barrier to modernized decision making approaches for organ acceptability. Additionally, we understand that the use of risk assessment and alternative immunologic assessment procedures are currently the standard practice for laboratories performing testing in the specialty of histocompatibility. Therefore, we proposed to add the requirements summarized below, at § 493.1278(d), to increase flexibility in the regulations and remove perceived barriers. These requirements include:

- Defining donor and recipient HLA antigens, alleles, and antibodies to be tested;
- Defining the criteria necessary to assess a recipient's alloantibody status;
- Assessing recipient antibody presence or absence on an ongoing basis;
- Typing the donor at the serological level, to include those HLA antigens to which antibodies have been identified in the potential recipient, as applicable;
- Describing the circumstances in which a pre- and post-transplant confirmation testing of donor and recipient specimens is required;
- Making available all applicable donor and recipient test results to transplant team;
- Ensuring immunologic assessments are based on the test report results obtained from a test report from CLIA certified testing laboratory(ies);
- Defining time limits between recipient testing and the performance of crossmatch; and
- Requiring that the test report must specify what type of crossmatch was performed.

At § 493.1278(f), we proposed to change the words ''transfusion'' and ''transfused'' to ''infusion'' and ''infused'', respectively. The relevance of HLA testing and the decisions of the extent of testing in both a transplant and transfusion setting are critical to both organ and cell acceptance in the host recipient. The use of the word ''transfusion'' is inappropriate given that the product itself is the transfusion but the action of introducing the product is the process of infusion. Transfusion is more specific to immunohematology. There are specific transfusion regulations in the immunohematology section at § 493.1271 that should not be confused with histocompatibility requirements. Since histocompatibility addresses materials that are not always blood products, we believe the term ''infusion'' would be more appropriate. We proposed moving § 493.1278(f) as revised to § 493.1278(e).

At § 493.1278(f)(1), we proposed revising this requirement to state that laboratories performing histocompatibility testing must establish and have written policies and procedures specifying the types of histocompatibility testing. We proposed moving this language to § 493.1278(e). In addition, we proposed adding ''identification'' after ''antibody screening'' in the revised § 493.1278(c), as identification is an important part of the process for crossmatching. Finally, we proposed removing ''compatibility testing'' at § 493.1278(f)(1) because this activity is specific to immunohematology, and crossmatching is a more appropriate description of what we understand is the current histocompatibility procedure used by laboratories. We proposed moving § 493.1278(f)(1) as revised to § 493.1278(e).

At § 493.1278(f)(1), we further proposed modifying the current general requirement to specify that the laboratory must establish and follow written policies and procedures that address the transplant type (organ, tissue, cell) donor type (living, deceased, or paired) and recipient type (high risk vs. non-sensitized). The following terminologies were also updated to reflect current practices: ''cadaver donor'' is replaced by ''deceased donor,'' ''transfused'' is replaced by ''infused,'' and ''combined'' is replaced by ''paired.'' In addition, we believe that clarifying the current regulatory language allows the laboratories to make decisions based on existing technologies and practices for determining what testing is applicable for those transplant programs they serve. We proposed moving § 493.1278(f)(1) as revised to § 493.1278(e)(1).

At § 493.1278(f)(2) through (3), we proposed to remove these requirements for renal and nonrenal transplantation crossmatch procedures which are perceived as obstacles to current practices by the transplant community and instead allow for alternative immunologic assessment procedures to be used in the designated specialty of histocompatibility. The requirements that the laboratory must establish and follow written policies and procedures are already addressed in the general requirements for all test systems under §§ 493.1445(e)(1) and (e)(3)(i), 493.1251, 493.1256(c) through (h), and 493.1451(b)(4) and, therefore, are duplicative. In addition, we proposed adding a new requirement for pre-transplant recipient specimens under the proposed § 493.1278(e)(3). Under this new proposed requirement, the laboratory must have written policies and procedures to obtain a recipient specimen for a crossmatch, or to document its efforts to obtain a recipient specimen, collected on the day of transplant. We recognize that the laboratory may not be able to obtain a recipient specimen collected on the day of a transplant since this collection process depends upon the physician obtaining the specimen and submitting it to the laboratory.

At § 493.1278(f)(1)(ii), we proposed modifying this requirement for laboratory policies and procedures as it would be included in the amended protocol requirements under the proposed regulation at § 493.1278(e)(1)(i) and (iii), and therefore, would be duplicative. The proposed revised requirement reflects current practices in the histocompatibility community.

At § 493.1278(f)(1)(iii), we proposed replacing ''the level of'' with ''type and frequency'' to clarify this revised requirement refers to the type and frequency of testing practice to support the clinical transplant protocols. We also proposed removing the examples of antigen and allele level in the regulation as these examples may not be all-inclusive and generally are reflected in guidance rather than regulatory text. We proposed redesignating § 493.1278(f)(1)(iii) as § 493.1278(e)(2).

The requirement at § 493.1278(g) would be redesignated as § 493.1278(f). This requirement remains unchanged.

We received public comments on these proposals at § 493.1278(e) through (f). The following is a summary of the public comments we received and our responses.

Comment: Several commenters stated that virtual crossmatch is an immunologic assessment, not a test. One of the commenters added that a ''test'' requires a specific procedure to be performed, and virtual crossmatches are often assessments of existing candidate and donor test results to determine potential immunologic compatibility or

the need for additional testing to occur. The commenters suggested modification of the proposed language at § 493.1278(d)(3) and § 493.1278(e) to include immunologic assessment language.

Response: The CLIA regulations refer to ''test'' and ''test systems,'' and do not refer to ''immunologic assessment.'' We believe this would cause confusion by introducing a new term to the regulations without defining the term. Therefore, we will incorporate information related to immunologic assessment in updated guidance related to § 493.1278(d)(3) and § 493.1278(e).

Comment: Several commenters requested clarification of the proposed new requirement for pretransplant recipient specimens at § 493.1278(e)(3). Another commenter questioned if the proposed requirement means that (1) laboratories must obtain a specimen on the day of the transplant or document the attempts made to obtain a specimen on the day of the transplant, or (2) laboratories must collect a specimen on the day of the transplant or have documentation of attempts to obtain such a specimen, but documentation could be after the day of the transplant. The second commenter requested additional clarity around the intended use of the proposed recipient specimen for crossmatch to be obtained on the day of the transplant and what the required use of that sample would be, adding that the laboratory and clinical team should be able to define how current a sample must be for candidate testing, as already required in the proposed § 493.1278(d)(2)(viii). The commenter believes the laboratory and clinical team should be able to assess the need for an updated sample after considering timing, potential sensitizing events, and previous candidate alloantibody levels and that it may not be necessary to draw an additional recipient specimen in all cases. The same commenter requested flexibility on pre-transplant samples drawn for young pediatric candidates, stating that the small size of some pediatric candidates can make additional blood volume drawn immediately pre-transplant harmful.

Response: As explained in the proposed rule, we recognize that the laboratory may not be able to obtain a recipient specimen collected on the day of a transplant since this collection process depends upon the physician obtaining the specimen and submitting it to the laboratory. Therefore, we proposed at § 493.1278(e)(3) that the laboratory has a process to obtain a recipient specimen, if possible, for crossmatch collected on the day of the transplant. If the laboratory cannot obtain a recipient specimen on the day of the transplant, it must have a process to document its efforts to obtain the specimen. The laboratory documentation does not have to be on the day of the transplant but could be after the day of the transplant. In this final rule, we are also adding clarification at § 493.1278(e)(3) that the recipient specimen be collected prior to transplantation on the day of the transplant. Also, as proposed under § 493.1278(e), laboratories must establish and follow written policies and procedures specifying the histocompatibility testing to be performed for each type of cell, tissue, or organ to be infused or transplanted. The laboratory or clinical team must have policies and procedures in place to define when there is a need for additional recipient specimens for immunologic assessment and the circumstances when the collection of additional recipient specimens is not needed, such as in pediatric cases. The laboratory is allowed flexibility to determine its policies and procedures under proposed revised §§ 493.1278(e)(3) and 493.1251.

After consideration of the comments received, we are finalizing the proposed changes at § 493.1278(e) and (f), with modification to the proposed revisions at § 493.1278(e)(3) related to the laboratory process to obtain a recipient specimen, if possible, for crossmatch collected on the day of the transplant and prior to transplantation.

B. Changes to Personnel Requirements

We stated in the proposed rule that CMS recognizes that the COVID–19 public health emergency (PHE) requires flexibility, and that we are committed to taking critical steps to ensure America's clinical laboratories can respond during a PHE to provide reliable testing while ensuring patient health and safety. As such, we requested that the public provide comments regarding how the CLIA personnel requirements in subpart M have affected the health system's response to the COVID–19 PHE and any potential opportunities for improvement to such requirements. We welcomed suggestions regarding potential improvements that may be specific to a pandemic or PHE context, as well as broader recommendations.

1. Definitions (§ 493.2)

a. Mid-Level Practitioner

At § 493.2, we proposed amending the definition of midlevel practitioner by adding a nurse anesthetist and clinical nurse specialist to the definition. CLIA currently defines a midlevel practitioner as a nurse midwife, nurse practitioner, or physician assistant. We stated in the proposed rule that we agree with CLIAC's recommendation to include nurse anesthetists and clinical nurse specialists in the definition of midlevel practitioner. We believe including nurse anesthetists and clinical nurse specialists in the definition will be inclusive of current types of mid-level practitioners. For example, the American Association of Nurse Anesthetists [17] scope of practice states that the practice may include performing point-of-care testing.

We received public comments on this proposed definition. The following is a summary of the comments we received and our responses.

Comment: A commenter expressed concern about updating the midlevel practitioner definition to include registered nurse anesthetists and clinical nurse specialists to be considered mid-level practitioners in the laboratory testing scope. The commenter noted that MTs have more courses designed to prepare them to work in a laboratory setting as compared to nursing students.

Response: The definition of a midlevel practitioner only applies to a site with a Certificate for Provider-performed Microscopy Procedures. PPM procedures, as described under § 493.19, are a select group of moderately complex microscopic tests that do not meet the criteria for waiver because they are not simple procedures; they require training and specific skills for test performance, and they must meet certain other standards. Since these procedures are performed at the time of a physician office visit, including registered nurse anesthetists and clinical nurse specialists as part of the definition of a midlevel practitioner allows greater access to PPM testing. The curriculum for the midlevel practitioners including RNAs and CNSs covers this type of testing.

After consideration of public comments, we are finalizing the proposed definition of ''midlevel practitioner.''

b. Continuing Education (CE) Credit Hours

At § 493.2, we proposed adding a definition for ''Continuing education (CE) credit hours'' to state that it means either continuing medical education (CME) or CE units. Generally, CME refers to continuing education credits earned by physicians (by which we mean doctors of medicine, osteopathy, or podiatric medicine). We proposed

[17] *https://www.aana.com/.*

that CE would be a broader term used for individuals seeking to qualify as LDs who are not physicians. We noted that in the current CLIA regulations at § 493.1405(b)(2)(ii), CME is considered as acceptable training or experience for individuals to qualify as a LD overseeing moderate complexity testing.

We stated in the proposed rule that because we were proposing in section III.B. of the proposed rule to require all individuals seeking to qualify as a LD for both moderate and high complexity testing to have 20 CE credit hours, we believed we needed to establish a more general term for purposes of the proposed requirement. As described below, the CE credit hours would cover all of the LD responsibilities defined in the applicable regulations and must be obtained prior to qualifying as a LD. For example, we proposed at § 493.1405(b)(2)(ii)(B), the 20 CE credit hours would be required to cover all of the LD responsibilities defined in § 493.1407 (moderate complexity testing).

The term CME was originally used because it was only required at § 493.1405(b)(2)(ii)(B), which is a provision specifically related to doctors of medicine, osteopathy, or podiatry. We believe that including a definition for CE credit hours in the CLIA regulations will respect that historic use, afford a means of referring to a broader range of professionals who may qualify as LDs, and alleviate confusion between the terms.

We received public comments on this proposed definition. The following is a summary of the comments we received and our responses.

Comment: A commenter noted that organizations provide CME for physicians that the Accreditation Council for Continuing Medical Education (ACCME) approves as CME providers. The commenter stated that CME programs are subject to strict rules about conflict of interest, commercial interests, and course design, which includes learning objectives. The commenter suggested that the definition of CE credit hours be modified to meet equivalent or similar standards as CME.

Response: The proposed definition of CE credit hours under § 493.2 includes CME as a CE option. As previously discussed, the term CME was originally used because it was only required at § 493.1405(b)(2)(ii)(B), which is a provision specifically related to doctors of medicine, osteopathy, or podiatry. We proposed and are now finalizing a continuing education requirement for non-physician LDs who do not have an earned doctoral degree in biology, chemistry, clinical or medical laboratory science or medical technology. Because the term CME generally refers only to continuing education credits earned by physicians, we are finalizing a broader term, CE, which is defined to include either CME or CEUs. CLIA regulations do not regulate either CME or CE providers regarding conflict of interest, commercial interests, and course design, which includes learning objectives. CLIA regulations do however require that to be qualified as an LD, the candidate must obtain CME credits, or under this final rule CE credits, which cover all of the LD responsibilities defined in the applicable regulations.

After consideration of public comments, we are finalizing the proposed definition of ''continuing education (CE) credit hours'' without modification.

c. Doctoral Degree

At § 493.2, we proposed adding a definition for ''doctoral degree'' to state that it means an earned post-baccalaureate degree with at least 3 years of graduate level study that includes research related to clinical laboratory testing or advanced study in clinical laboratory science or medical technology. Originally, degrees were given in medical technology; however, the naming convention for medical technology degrees has changed since the regulations were first published in the February 1992 final rule with comment period. We stated in the proposed rule that the degree is now referred to as clinical laboratory science and that a clinical laboratory science degree is synonymous with a medical technology degree. For purposes of 42 CFR part 493, doctoral degrees would not include doctors of medicine (MD), doctors of osteopathy (DO), doctors of podiatry, doctors of veterinary medicine (DVM), or honorary degrees.

We proposed this modification to CLIA regulations to clarify what we mean by the term ''doctoral degree.'' It seems this general term has created confusion as various interested parties have inquired about the following.

- Are doctors of medicine degrees considered to be a type of doctoral degree?
- Does a doctoral degree include traditional (for example, Doctor of Philosophy (Ph.D.), doctorate in science (DSc) and professional (for example, Doctorate in Clinical Laboratory Science (DCLS)) degrees or does doctoral degree only mean a Ph.D.?

The CLIA regulations for personnel qualifications separate doctors of medicine, osteopathy, and podiatry from other non-medical doctoral degrees by including specific qualification requirements for these three types of degrees. MD and DO degrees pertain to post-graduate level education, specifically in medicine, and are associated with treating illnesses and medical conditions. In contrast, doctoral degrees can be obtained in various fields like biology and chemistry. Historically, we intended a doctoral degree to mean a Ph.D. in a science field related to laboratory work. However, we have come to understand that our doctoral degrees could be interpreted more broadly to include both traditional and professional doctoral degrees. Doctoral degree is a general term used to describe post-graduate level education for various non-medical specific degrees and includes both traditional (for example, Ph.D., DSc) and professional (for example, DCLS) degrees. A traditional earned doctoral degree is generally focused on research and may include academic coursework and professional development. In contrast, a professional earned doctoral degree emphasizes specific skills and knowledge for success in a particular profession without a concentrated focus on research. For example, the DCLS is an advanced professional doctorate designed for practicing clinical laboratory scientists (CLSs) or medical technologists (MTs) who have at least a bachelor's degree and wish to further their level of clinical expertise and develop leadership and management skills. Individuals with a DCLS are experts in clinical laboratory testing. Individuals must have a bachelor's degree in medical technology or clinical laboratory science and the requisite experience in order to be admitted to a DCLS graduate program. The DCLS contributes to increasing laboratory efficiency and improves timely access to accurate and appropriate laboratory information. A graduate of a DCLS program will be able to: provide appropriate test selection and interpretation of test results; monitor laboratory data and testing processes; improve the quality, efficiency, and safety of the overall diagnostic testing process; and direct laboratory operations to comply with all State and Federal laws and regulations. We would consider a DCLS an acceptable doctoral degree.

For the purposes of qualifying under the CLIA personnel regulations, we do not consider a MD or DO to be the same as a non-medical doctoral degree. Therefore, these individuals must continue to qualify under the applicable CLIA personnel regulations, that is, MDs and DOs must qualify under doctors of medicine or osteopathy requirements.

Those individuals with non-medical doctoral degrees as outlined previously in this final rule must qualify under the doctoral degree requirements. We stated in the proposed rule that if finalized, the State Operations Manual (SOM) [18] will be updated accordingly.

The CLIA regulations aim to ensure accurate and reliable testing on specimens derived from the human body for the purposes of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of health of human beings. Therefore, we stated in the proposed rule that we believe that DVM should be removed from the qualifying doctoral degrees as it is not relevant to testing on specimens derived from the human body. We understand many of the methodologies may be the same; however, testing on human specimens is clearly specified in the statutory language and regulatory definition of a laboratory under CLIA. Therefore, testing of animal specimens does not meet the intent of the CLIA regulations. Of the nine boards approved by HHS for qualification of applicants with doctoral degrees, only one allows individuals with DVMs to sit for board certification. Since 1965, American Board of Medical Microbiology has granted certification to four individuals. We stated that individuals who have previously qualified under a provision requiring a doctoral degree will continue to qualify under the new rule, if finalized. We further stated that if finalized, we would remove the reference to DVMs in the SOM, Chapter 6 (that is, Interpretive Guidelines) under § 493.1443(b)(3) (page 353).

Finally, as discussed previously in this rule, we proposed that a doctoral degree must be an earned post-baccalaureate degree with at least 3 years of graduate level study that includes research related to clinical laboratory testing or advanced study in clinical laboratory science or medical technology. As such, honorary degrees do not meet the intent of a qualifying doctoral degree as an individual has not completed the necessary course and laboratory work required for the post-baccalaureate degree or necessary to ensure quality testing, for example, accurate and reliable results. We believe that qualifying individuals who hold only honorary degrees is not consistent with the public health purposes of the CLIA statute. Furthermore, we believe that this would impede CMS' ability to ensure health and safety of the public and individuals served by CLIA-certified laboratories.

We received public comments on this proposed definition. The following is a summary of the comments we received and our responses.

Comment: Several commenters referenced the 2022 decision by the American Medical Technologists (AMT), ASCP, and the American Society for Clinical Laboratory Science (ASCLS) to change the MT certification designation to Medical Laboratory Scientist (MLS). The commenters stated that this change recognizes the specialized expertise that the medical laboratory scientist brings to the practice of healthcare diagnostics, which needs to be adequately reflected in the term 'technologist.' The commenters suggested that medical laboratory science should be used in addition to clinical laboratory science in the proposed definition of doctoral degree under § 493.2.

Response: We agree with the commenters that medical laboratory science should be included in the definition of a doctoral degree, aligning with the 2022 decision to rename MT to MLS to elevate the visibility of the laboratory field. As a result, we have incorporated the change suggested by the commenters to include medical laboratory science in addition to clinical laboratory science in the finalized definition of doctoral degree at § 493.2, and elsewhere in these finalized regulations, where applicable, as discussed later in this final rule.

Comment: A commenter expressed concern about the proposed definition of a doctoral degree, stating that many LDs with Ph.D. degrees come from a basic science background. These degrees require laboratory experience, yet that experience may not be related to clinical laboratory testing or clinical laboratory science. The commenter stated that qualification to direct a clinical laboratory is ensured by requiring board certification. The commenter believed that limiting permissible doctoral degrees to those relating directly to medical or clinical laboratory science would eliminate the vast majority of the candidate pools many fellowship programs draw from.

Response: We disagree with the commenter. The revised LD qualifications for moderate (§ 493.1405) and high (§ 493.1443) complexity testing expand the LD candidate pool in two ways. One, while we have removed physical science as a qualifying degree, we are adding two new degree types: medical laboratory science and medical technology. Two, if individuals hold non-qualifying degrees, they now have the opportunity to qualify under the new educational pathways. The CLIA regulations ensure accurate and reliable testing on specimens derived from the human body for the purposes of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of health of human beings. We believe that the inclusion of research related to clinical laboratory testing or advanced study in clinical laboratory science, medical laboratory science, or medical technology in the doctoral degree definition, as well as the additional educational option, encompasses the need to ensure that LDs complete the required course and laboratory work to ensure quality testing for accurate and reliable results.

Comment: Several commenters disagreed with the proposed removal of the DVM degree from the qualifying doctoral degrees. Commenters stated that during the COVID–19 PHE, veterinary diagnostic laboratories (VDLs) were a significant resource capable of conducting critical public health diagnostic and surveillance testing. The commenters stated that VDLs conducted millions of tests that might otherwise not have been run. Commenters further stated that in some States, the VDL response capability and capacity served as the primary COVID–19 testing resource. However, they asserted that incorporating this valuable resource into the PHE response was often significantly delayed due to the inflexibility regarding recognizing VDL staff's training, knowledge, and experience as equal to that mandated under CLIA. Another commenter indicated that directors of VDLs are board certified in their specialties and often have Ph.D.s in addition to their DVMs. There were additional commenters that supported the removal of a DVM degree from the qualifying doctoral degrees.

Response: Based on the critical role veterinary facilities provided in rapidly increasing testing capacity during the COVID–19 PHE, we believe it is appropriate to include DVMs during PHEs and may consider extending that flexibility in future PHEs. However, for the reasons previously discussed, these degrees would not be included as qualifying doctoral degrees outside of a PHE. Personnel with DVM degrees may qualify through the other routes indicated in subpart M. In addition, any individual with a DVM who is qualified and employed as an LD as of the effective date of this final rule will be grandfathered and continue to qualify as outlined in the grandfather provisions

[18] *https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107c06pdf.pdf.*

discussed elsewhere in this final rule, provided the individual remains continuously employed as an LD after the effective date.

After consideration of public comments, we are finalizing the proposed definition of ''doctoral degree'', with modification to include medical laboratory science. We are also modifying ''doctors of podiatry'' to ''doctors of podiatric medicine (DPM)'' to be consistent with current regulations.

d. Training and Experience

At § 493.2, we proposed to add a definition for ''Laboratory training or experience'' to state that it means that the training or experience must be obtained in a facility that meets the definition of a laboratory under § 493.2 and is not excepted from CLIA under § 493.3(b). Laboratory subject to CLIA would mean the laboratory meets the definition of a ''laboratory'' under § 493.2. Training and experience obtained in a research laboratory that only reports aggregate results or a forensic laboratory does not meet this definition. These types of facilities are exempt from CLIA under § 493.3(b), and as such, training and experience acquired in these facilities is not applicable to CLIA laboratories.

In all situations, an individual is required to meet training and/or experience requirements in addition to the educational requirements to competently perform their regulatory responsibilities. Because the CLIA personnel requirements for nonwaived testing are based on the complexity of testing performed (moderate versus high), we concluded that appropriate training and experience is necessary. Comments from the 2018 RFI support this proposal. Comments received from the 2018 RFI include the following:

- Training and or experience should be in a CLIA certified laboratory.
- Research experience is not equivalent to clinical experience.
- Dependent on complexity level of testing, minimum standards should increase as the complexity level increases.

Further, commenters stated that documentation from a former employer would be acceptable, provided it included specific details of the individual's job description, training and competency assessment (CA) for areas of testing performed. This documentation could be from an LD, manager or supervisor.

We concur with the CLIAC recommendation, and comments from the 2018 RFI that all personnel should have training and experience in their areas of responsibility as listed in CLIA for the appropriate test complexity as shown in Table 8, which shows the specific personnel categories that have a provision requiring training or experience, or both, or require experience directing or supervising, or both.

TABLE 8: Personnel Requirements by Test Complexity for Proposed Personnel Changes that Require Training or Experience, or Both

CLIA Section	Role	Complexity
§ 493.1405	Laboratory director	Moderate
§ 493.1411	Technical consultant	Moderate
§ 493.1423	Testing personnel	Moderate
§ 493.1443	Laboratory director	High
§ 493.1449	Technical supervisor	High
§ 493.1489	Testing personnel	High

This means personnel should have training or experience examining and performing tests on human specimens for the purpose of providing information that is used in diagnosing, treating, and monitoring an individual's condition.

Each individual must have documentation of training or experience applicable to the types and complexity of testing performed. This training should be such that the individual can demonstrate that he or she has the skills required for the proper performance of pre-analytic, analytic, and post-analytic phases of testing. For example, if the individual performs blood gas testing on a nonwaived point of care device, demonstration of skills should include, but is not limited to, the following:

- Proper specimen collection, handling and labelling;
- Proper test performance according to the laboratory's policies and manufacturer's instructions;
- Verification of performance specifications;
- Calibration and preventive maintenance;
- Proficiency testing; and
- Proper reporting of patient test results.

Training may include, but is not limited to, attendance at:

- Seminars given by experts in the field;
- On-site or off-site instrument trainings given by a manufacturer;
- Technical training sessions, workshops, or conferences given by a professional laboratory organization; or
- A formal laboratory training program.

Documentation may consist of, but is not limited to:

- Letters from training programs or employers;
- Attestation statements of an individual's training and experience by the LD;
- Log sheet(s) initialed by the attendees indicating attendance at a training session or in-service; and
- Certificates from organizations providing the training session, workshop, conference, specialty course.

We expect all documentation supporting an individual's education, training and experience to be independently generated, that is, not authored by the individual who is trying to meet CLIA personnel qualification requirements. For example, a curriculum vitae (CV) is not acceptable verification, in and of itself, to document an individual's education, training or experience. Letters on letterhead from previous employment, competency assessment, and comprehensive list of job responsibilities may be examples of acceptable documentation.

Laboratory testing of non-human specimens is not acceptable experience, for example, environmental, animal testing, as it is not used for the purpose of providing information used in the diagnosis, prevention, or treatment of any disease or impairment of, or the

assessment of the health of, human beings.

Comments received on the 2018 RFI stated that experience from a research laboratory should not be accepted. Depending on the circumstances, research testing can be either exempt from CLIA or subject to CLIA. Specifically, research laboratories that test human specimens but do not report patient specific results for the diagnosis, prevention or treatment of any disease or impairment of, or the assessment of the health of individual patients, are excepted from the CLIA regulations at § 493.3(b)(2). In accordance with that regulation, only those facilities performing research testing on human specimens that do not report patient-specific results may qualify to be exempt from CLIA certification.[19] An example of a non-patient-specific result would be ''10 out of 30 participants were positive for gene X.'' The result in this example is a summary of the group data and is not indicative of an individual's health. An example of a patient—specific result would be ''participant A was positive for gene X'' in which the result is specific to participant A. In cases where patient-specific test results are maintained by a statistical research center for possible use by investigators in which the results are not reported out as patient-specific and could not be used ''for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings,'' CLIA would not apply.

Research testing where patient-specific results are reported from the laboratory, and those results will be or could be used ''for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings'' are subject to CLIA. Therefore, we would consider research experience related to reporting patient-specific results as applicable experience to meet the CLIA personnel requirements; however, if the research experience only included aggregate reporting of results, we would not consider this acceptable experience to meet CLIA personnel requirements as this type of research testing is exempt from CLIA (§ 493.3(b)(2)).

CLIA regulations at § 493.3(b)(1) specifically exempt facilities or components of facilities that only perform testing for forensic purposes from CLIA requirements. This was addressed in a Survey and Certification policy memo (S&C–08–35) published on September 5, 2008 (*https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Policy-and-Memos-to-States-and-Regions.html*). (See the preamble to the February 1992 final rule with comment period for an important discussion concerning this subject (57 FR 7014)).

In summary, laboratory results generated purely for the purpose of detecting illegal substances or illegal amounts of certain substances in the body may be relevant to legal proceedings. However, there is no concern in such testing for developing accurate and reliable data for use by health care professionals for the purpose of diagnosis or treatment. The determining factor is not the test itself, but the purpose for which the test is conducted.

In addition, based on the CLIA law, forensic testing is excluded under CLIA since forensic testing is conducted to determine if there has been a violation of the law and is not done for the purpose for providing diagnosis, treatment or assessment of health.

Therefore, we do not consider forensic testing to be an acceptable experience or training to meet CLIA personnel requirements as this type of testing is exempt from CLIA (§ 493.3(b)(3)).

We received public comments on this proposed definition. The following is a summary of the comments we received and our responses.

Comment: A commenter suggested expanding the definition of laboratory training or experience to allow research staff to qualify as laboratory testing personnel.

Response: The CLIA statute [20] defines a laboratory as a facility for the biological, microbiological, serological, chemical, immuno-hematological, hematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings. Laboratories that are performing research only (and do not report patient specific results for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings) are not subject to CLIA regulations. Personnel with experience in a research laboratory may qualify under the methods listed under CLIA subpart M—Personnel for Nonwaived Testing.

After consideration of public comments, we are finalizing the proposed definition of ''laboratory training or experience'' without modification.

e. Experience Directing or Supervising

At § 493.2, we proposed adding a definition for ''Experience directing or supervising'' to state that it means that the director or supervisory experience must be obtained in a facility that meets the definition of a laboratory under § 493.2 and is not excepted under § 493.3(b). Experience directing or supervising a research laboratory that tests human specimens but does not report patient-specific results for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of individual patients would not meet this definition (for example, reporting of aggregate results). Experience directing or supervising any facility or component of a facility that only performs testing for forensic purposes also would not meet this definition. The ordering of tests and interpreting and applying the results of these tests in diagnosing and treating an individual's illness would not meet this definition because it is not related to the performance of clinical laboratory testing. Ordering of tests and interpreting and applying of results falls under the practice of medicine and are not related to the performance of clinical laboratory testing. Teaching experience directly related to a medical technology or clinical laboratory sciences program, or a clinical laboratory section of a residency program, would be considered acceptable experience because we understand that such experience from teaching related to a medical technology or clinical laboratory sciences program would include all aspects of the entire testing process (pre-analytic, analytic and post-analytic), as well as quality control and quality assessment. These are critical responsibilities of a LD as defined by CLIA. See discussion on proposed definition of ''Laboratory training or experience'' for more information on proposed treatment of research laboratories and forensic testing experience.

We did not receive public comments on this proposed definition for ''Experience directing or supervising'' and are finalizing as proposed.

2. PPM Laboratory Director Responsibilities (§ 493.1359)

At § 493.1359, we proposed clarifying the competency assessment (CA)

[19] *https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Downloads/Research-Testing-and-CLIA.pdf.*

[20] *https://www.govinfo.gov/content/pkg/USCODE-2011-title42/pdf/USCODE-2011-title42-chap6A-subchapII-partF-subpart2-sec263a.pdf.*

requirements for PPM laboratories in the Standard for PPM LD responsibilities, as this testing is moderate complexity per § 493.19(b)(2) and subject to CA. Based on the fact the regulations do not have a requirement for a TC for PPM laboratories, we believe that it is currently unclear in the regulation how CA applies to these types of laboratories. The SOM, Appendix C (that is, Interpretive Guidelines) on page 151 (*https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107ap_c_lab.pdf*) discusses CA for PPM laboratories. Therefore, we proposed clarifying, via modifications to this LD responsibilities section of the regulations, the CA requirement for PPM laboratories. We proposed that the LD evaluate the competency of all TP to ensure that the staff maintains their competency to perform test procedures and report test results promptly, accurately, and proficiently. This would include the following:

- Direct observations of routine patient test performance, including patient preparation, if applicable, specimen handling, processing, and testing;
- Monitoring the recording and reporting of test results;
- Review of test results or worksheets;
- Assessment of test performance through testing internal blind testing samples or external proficiency testing samples; and
- Assessment of problem solving skills.

Generally, these requirements mirror the CA provisions for moderate and high complexity testing at §§ 493.1413(b)(8) (technical consultant responsibilities) and 493.1451(b)(8) (technical supervisor responsibilities). We did not propose to include ''Direct observation of performance of instrument maintenance and function checks'' as the only equipment required for PPM testing is limited to bright-field and phase-contrast microscopy. Typically, TP do not perform these activities for PPM testing; rather, they are performed by third-party entities.

In addition, we proposed at § 493.1359(d) the same CA intervals as in §§ 493.1413(b)(8) and 493.1451(b)(8) apply to mid-level practitioners for consistency. That is, evaluating and documenting the performance of individuals responsible for PPM testing at least semiannually during the first year the individual tests patient specimens. Thereafter, evaluations must be performed at least annually.

We received public comments on these proposals at § 493.1359. The following is a summary of the public comments we received and our responses.

Comment: A commenter suggested that TCs be allowed to perform PPM procedure CA. The commenter noted that TCs are not defined in the CLIA regulations but believes they are qualified to conduct CA for PPM procedures. The commenter also stated that allowing TCs to perform competency assessments would facilitate flexibility in meeting this requirement and reduce the burden on the LD.

Response: Testing sites that hold a CLIA Certificate for Provider-performed Microscopy Procedures are subject to CLIA personnel regulations for the laboratory director (§§ 493.1355, 493.1357, and 493.1359) and testing personnel only (§§ 493.1361, 493.1363, and 493.1365). CLIA does not have a personnel category for TC in PPM personnel requirements. The proposed CA provisions for LD of a PPM certificate mirror the CA provisions for moderate complexity testing at § 493.1413(b)(8) (TC responsibilities). If a CLIA CoC or CoA laboratory performs PPM procedures, then that laboratory is subject to all CLIA regulations related to moderate complexity testing. In those laboratories with a CoC or CoA, a TC can perform CA for moderate complexity testing including PPM procedures under § 493.1413(b)(8). However, in a CLIA certificate for PPM, it will be the LD's responsibility to perform CA.

Comment: A commenter suggested reducing the frequency of conducting the CA of individuals responsible for PPM testing to every 2 years rather than annually. The commenter noted that PPM testing is often performed by physicians or licensed providers with advanced degrees and extensive training who are highly engaged in the clinical situations where they are conducting the testing.

Response: PPM testing is moderate complexity per § 493.19(b)(2). The proposed CA intervals were kept the same as those for moderate and high complexity for consistency.

Comment: A commenter supported requiring PPM LDs to undergo CAs at the same interval as moderate and high complexity laboratories. The commenter stated that since PPM laboratories are not inspected regularly, there currently needs to be a mechanism for State agencies to monitor CA activities to ensure compliance. The commenter suggested that CMS devise and implement reporting requirements and inspection methods for PPM laboratories.

Response: CLIA Certificate for PPM Procedure laboratories must meet the applicable requirements for inspection under subpart Q of the CLIA regulations. We further note that reporting and inspection requirements are outside the scope of this rule.

In the proposed rule, we used the following terms to refer to the provider-performed microscopy procedure certificate: Certificate for Provider Performed Microscopy Procedures (PPMP), Certificate of Provider Performed Microscopy (PPM), and Certificate for Provider Performed Microscopy (PPM). For internal consistency, we are updating these terms in this section and throughout this final rule to ''Certificate for Provider-performed Microscopy (PPM) Procedures'' when referring to the provider-performed microscopy procedures certificate.

We also note that in this final rule, CMS is making technical changes to proposed section § 493.1359(d) to enhance consistency.

After consideration of public comments, we are finalizing the changes to § 493.1359 as proposed, with modification for internal consistency at § 493.1359(d).

3. Laboratory Director Qualifications (§ 493.1405)

At §§ 493.1405(b)(1)(ii), 493.1411(b)(1)(ii), 493.1443(b)(1)(ii), and 493.1449, we proposed removing ''or possess qualifications that are equivalent to those required for such certification.'' In making this proposal, we acknowledge that there are limited timeframes for an individual to sit for the boards, however, by allowing any such ''eligible'' individual to qualify under our regulations, we have found that some individuals may never sit for exams or may even fail the exams. Such individuals were not who we intended to be eligible under these provisions. Further, even if we were to ban such individuals by carving them out of those we considered to hold ''qualifications that are equivalent to those required for certification,'' it would be difficult to identify those individuals and remove them from their LD roles. In making this proposal, we acknowledged having historically accepted letters from individuals that have documented proof from the American Board of Pathology or American Board of Osteopathic Pathology that they are eligible to sit for the boards based on SOM guidance (*https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107ap_c_lab.pdf,* page 351, D6078). In addition, we proposed eliminating the equivalency standard, as

we do not have a means to evaluate equivalency to other boards for equivalency to American Board of Pathology or American Board of Osteopathic Pathology as it would be up to the Board to make a determination of equivalency, and we do not believe in retrospect it would be appropriate to expect those entities to conduct such analyses. Furthermore, we had requested that CLIAC consider what ''possessing qualifications that are equivalent to board certification'' should mean. CLIAC recommended that this verbiage be removed from relevant sections of subpart M because it was confusing, and we have no mechanism to determine when qualifications are ''equivalent to board certification.'' We concur with the CLIAC recommendation. Further, we believe that individuals who historically may have qualified under this provision would still qualify through alternative routes, thus not disadvantaging individuals seeking to qualify as LDs. We further proposed that an individual who qualified under the predecessor regulations and is currently employed as a LD may continue to serve in that capacity so long as there is no break in service after the effective date of this final rule. For example, an individual who is serving as the LD of a CLIA-certified laboratory at the date of the publication of the final rule, and continues to serve as a LD of CLIA-certified laboratory that performs nonwaived testing, would continue to qualify. However, an individual who does not continue as LD of a CLIA-certified laboratory after the date of implementation of the final rule would need to requalify under the new provisions.

At § 493.1405(b)(2)(ii)(A), we proposed changing the ''or'' to an ''and'' to include directing or supervising nonwaived laboratory testing in the provision. In addition, we proposed to remove ''Beginning September 1, 1993'' from § 493.1405(b)(2)(ii)(B) and continue to retain the provision for 20 hours of CE credit hours for moderate complexity LDs who are seeking to qualify without certification by the American Board of Pathology and the American Board of Osteopathic Pathology. We believe by requiring the 20 CE credit hours, the LDs would have a better understanding of their responsibilities in the overall management and direction of laboratories, which would result in improved overall compliance. Historically, LD citations are among the top 10 condition-level deficiencies cited by surveyors. We believe that this would also improve the ability of laboratories to report accurate and reliable test results, thus helping to protect the health and safety of the public.

At §§ 493.1405(b)(2)(ii)(C) and 493.1443(b)(2)(i), we proposed removing the residency provision for the following reasons. First, the residency requirement causes confusion with board certification for doctoral degrees (for example, American Board of Internal Medicine). It is also challenging for these individuals to qualify under this provision as the medical residencies generally do not include the type of laboratory training or require the 1 year of laboratory training that we would expect to see related to laboratory administration and operation for which the LD is responsible. We would expect the residency program to provide an individual with essential information regarding the principles and theories of laboratory practice, including quality control and quality assessment; proficiency testing; the phases of the total process (that is, pre-analytic, analytic, and post-analytic), as well as general laboratory systems; facility administration; and development and implementation of personnel policy and procedure manuals. This training should also include hands-on laboratory testing. However, a typical residency does not include a year of laboratory training (defined in interpretive guidelines as 2,080 hours of laboratory training) nor does it include essential information on the principles and theories of laboratory practice. We have observed, and AOs have noted to us, that very few individuals qualify through the medical residency route. The onus for providing the documentation related to clinical laboratory experience during residency is on the applicants (that is, the applicants must document their clinical laboratory experience during residency).

CLIAC recommended that we clarify the residency requirements by emphasizing the requisite laboratory training must be ''clinical laboratory training,'' meaning ''have at least one year of clinical laboratory training during medical residency or fellowship.'' However, we believe that 1 year of laboratory training is vague. We also believe that after removing the residency requirement, there would be several alternative routes for individuals to qualify as LDs. Individuals seeking to qualify as a moderate complexity LD may still qualify under § 493.1405(b)(3) through (5) without a medical residency. We would continue to accept residency experience as counting toward the requirement of 2 years of laboratory experience directing or supervising high complexity testing for doctors of medicine, doctors of osteopathy, or doctors of podiatry. We would also accept experience directing or supervising high complexity testing from a medical fellowship program toward the requirements outlined in the regulations. Generally, a fellowship program follows a residency program and is for those individuals who choose to pursue additional training in their specialty. Section 493.1443(b)(2)(ii) is the current requirement that allows individuals with at least 2 years of experience directing or supervising high complexity testing to qualify under paragraph (b)(2).

At § 493.1405(b)(3), we proposed revising paragraph (b)(3)(ii) to include an educational option that includes a qualification algorithm for an individual that does not have an earned doctoral degree in a chemical, biological, or clinical laboratory science or medical technology (see section I.D.1.a of the proposed rule). We also proposed adding paragraph (b)(3)(iii) to include the addition of 20 CE credit hours for doctoral degrees, as well as the current paragraphs (b)(3)(i) through (ii). This would include the requirement to be certified by an applicable board and continue to be certified and have at least 1 year of experience directing or supervising nonwaived testing. (As discussed later in this section of the final rule, these provisions in the proposed rule at § 493.1405(b)(3) are being reformatted and finalized at the revised (b)(3)(i) through (ii).)

The current CLIA regulations at §§ 493.1405, 493.1411, 493.1423, 493.1441, 493.1449, 494.1461, and 493.1489 indicate acceptable degrees for personnel as those in a chemical, physical, biological science, or clinical laboratory science or medical technology. Degree names and types have changed since the CLIA regulations were first published in 1992. As a result, in some cases, there are degrees for which the area of study may not be clear based on the name of the degree given. This makes it challenging for CMS, State agencies, Exempt States (ES), and AOs to determine what types of degrees are considered acceptable degrees in order to qualify CLIA personnel. At the time the CLIA regulations were published, individuals typically received a degree in the areas of biology, chemistry, medical technology, or clinical laboratory science. Today, we often must perform an evaluation of transcripts to determine if the individuals meet CLIA personnel requirements.

We believe it is important that individuals lacking a traditional degree in chemical, biological, or clinical laboratory science or medical technology should be considered if they have completed the coursework that is equivalent to the aforementioned traditional degrees and acquired documentation of the equivalent educational coursework. In addition to the educational requirements discussed in this section, CLIA also has experience and training requirements (see our proposed updates to §§ 493.1405, 493.1411, and 493.1423), but they will not be addressed in this educational discussion.

We believe degrees should be in a science that deals in the kind of clinical laboratory testing, that is related to testing of human specimens as the definition of a ''laboratory,'' which is defined in terms of the examination of materials from the human body for the purposes of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of human beings (see § 493.2). In some cases, it is clear that a degree would meet these standards. For example, degrees in microbiology, genetics, molecular biology, biochemistry, and organic chemistry would be considered appropriate degrees. In other instances, it is not apparent whether the degree would meet such requirements. Environmental sciences, biotechnology, and marine biology are examples of degrees that would not appear in keeping with the scope of the CLIA program. At face value, we do not believe these types of degrees should qualify an individual under the requirements in subpart M because they are not related to clinical laboratory testing. Environmental science degrees may cover such areas as ecosystem management, the impact of industrialization on the environment, and natural resource management. Biotechnology degrees focus on developing technologies and products related to medical, environmental, and industrial areas. Marine biology focuses on studying marine organisms, their behaviors, and interactions with the environment. We would not consider these to be appropriate degrees under the CLIA program because these degrees do not generally appear to be focused on clinical laboratory testing or focused on the testing of human specimens, which is the scope of the CLIA regulations. However, in the proposed rule, we proposed an option for an educational algorithm based on semester hours (SH) as an alternative qualification mechanism. We stated in the proposed rule that if finalized, individuals with degrees that are not clearly biological or chemical in nature may be evaluated using this algorithm and may qualify for CLIA personnel positions in subpart M.

In developing the proposed algorithm, we explored the required courses for bachelor's, master's, and doctoral degrees in the major studies of biology, chemistry, and medical technology. For purposes of this discussion, only degrees in biology and chemistry will be addressed, as degrees in medical technology and clinical laboratory science do not need to be evaluated for equivalency. Multiple sections of the CLIA regulations specify that educational degrees in ''chemical, physical or biological science or medical laboratory technology from an accredited institution'' constitute appropriate education to qualify for laboratory roles in the noted complexity and laboratory specialty areas. In all situations, the educational requirement is based on the laboratory individual having a sufficient educational background (coursework) to be qualified to gain the subsequent training and experience to competently perform their roles.

Three levels (small, medium, and large) of both public and private accredited universities and colleges were reviewed. For purposes of this research, small institutions were defined as less than 5,000 students, medium as 5,000 to 15,000 students, and large as greater than 15,000 students. Seven colleges and universities were evaluated for all three defined types. Table 9 describes the number of SH required across all three sizes of colleges and universities for both a bachelor's in Biology and a bachelor's in Chemistry.

TABLE 9: Average Required Semester Hours (SH)* for Bachelor's Degrees in Biology and Chemistry

Semester Hours (SH)	Bachelor's Biology	Bachelor's Chemistry
Biology SH	20-49	≥8**
Chemistry SH	8-20	25-56
Other (Includes biology/chemistry)	7-28	11-42

* Quarter hours may be converted to semester hours by multiplying the semester hours by 1.5. For example, 3 semester hours is equivalent to 4.5 quarter hours.

**The majority of colleges and universities did not break out the biology SH, but instead grouped them in "Other".

In general, accredited colleges and universities require general biology, molecular biology or genetics, general chemistry, organic chemistry, and biochemistry. We proposed a specific coursework algorithm to qualify candidates, in lieu of a qualifying degree, for all testing levels. At present, only § 493.1489(b)(2)(ii) specifies specific coursework required. This is for an associate degree individual to perform high complexity testing. Specifying coursework requirements will allow CMS, State agencies (SA), accreditation organizations (AO), and exempt States (ES) to consistently evaluate educational qualifications.

For both the doctoral degree and master's degree curricula, there were no consistent coursework, thesis or research requirements for Biology and Chemistry majors of study. For example, evaluation of the master's degree requirements revealed three tracks that included:

- Coursework;
- Coursework and thesis; and
- Coursework, thesis, and research.

For doctoral degrees, we proposed the following educational algorithm for those individuals who have a doctoral degree that is not clearly in a chemical or biological science. We stated that we would expect those individuals to:

- Meet master's degree equivalency; and
- At least 16 SH of additional doctoral-level coursework in biology,

chemistry, medical technology, or clinical laboratory science; and

• A thesis or research project in biology, chemistry, medical technology, or clinical laboratory science related to laboratory testing for the diagnosis, prevention, or treatment of any disease or impairment of or the assessment of the health of human beings.

CLIAC recommended that other degrees (such as those in the humanities, physical sciences, and others) may not have the requisite science coursework, and candidates for positions should be considered based on a minimum number of hours of courses with laboratory components with relevance to clinical laboratory testing (which could also come from post degree curricular work). We concur with CLIAC's recommendation that relevant science and laboratory coursework should be considered when evaluating an individual's education qualifications.

The educational algorithm may allow individuals without a traditional chemical or biological degree to meet the CLIA personnel education requirements based on their coursework. Individuals who may have the appropriate coursework would not be disadvantaged by having a degree that is not considered chemical or biological in nature. Please note that the requirements for the applicable laboratory training or experience, or both, found in subpart M (and discussed previously), are required in addition to the educational requirement.

At § 493.1405(b)(4), we proposed redesignating current paragraphs (b)(4)(ii) and (iii) as paragraphs (b)(4)(iv) and (v), respectively. We proposed new paragraphs (b)(4)(ii) and (iii) as additional educational options that include a qualification algorithm for an individual that does not have a master's degree in a chemical, biological, or clinical laboratory science or medical technology (see section III.B.3. of the proposed rule). We proposed adding a new requirement at paragraph (b)(4)(vi) to include the addition of 20 CE credit hours. (As discussed later in this section of the final rule, these provisions in the proposed rule at § 493.1405(b)(4) are being reformatted and finalized at the revised (b)(4)(i) through (iv)).

As a result of the above discussion, we proposed that individuals meet either of the following two options for use as educational algorithms:

• Option 1

++ Meet bachelor's degree equivalency; and

++ At least 16 SH of additional graduate level coursework in biology, chemistry, medical technology, or clinical laboratory science; or

• Option 2

++ Meet bachelor's degree equivalency; and

++ At least 16 SH, which may include a combination of graduate level coursework in biology, chemistry, medical technology, or clinical laboratory science and a thesis or research project related to laboratory testing for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.

At § 493.1405(b)(5), we proposed redesignating current paragraphs (b)(5)(ii) and (iii) to paragraphs (b)(5)(iii) and (iv), respectively. In addition, we proposed a new paragraph (b)(5)(ii) with an educational option that includes a qualification algorithm for an individual that does not have a bachelor's degree in a chemical, biological, or clinical laboratory science or medical technology (see section I.D.1.c. of the proposed rule). We also proposed adding a new requirement at paragraph (b)(5)(v) to include the addition of 20 CE credit hours. (As discussed later in this section of the final rule, these provisions in the proposed rule at § 493.1405(b)(5) are being reformatted and finalized at the revised (b)(5)(i) through (iv)).

In general, an associate degree requires the completion of 60 SH, and a bachelor's degree requires the completion of 120 SH. In the case of bachelor's degrees, for this reason, we proposed that the equivalent educational requirements for associate degrees at the existing § 493.1489(b)(2)(ii) should be doubled. That is, an individual must have at least 120 SH, or equivalent, from an accredited institution that, at a minimum, include either 48 SH of medical laboratory technology or clinical laboratory science courses; or 48 SH of science courses that include: 12 SH of chemistry, which must include general chemistry and biochemistry or organic chemistry; 12 SH of biology, which must include general biology and molecular biology, cell biology or genetics; and 24 SH of chemistry, biology, or medical laboratory technology or clinical laboratory science in any combination. (*Note:* We did not propose to amend the education SH requirements at the existing § 493.1489(b)(2)(ii) in the proposed rule, as there is no need to amend. However, in the proposed and now final rule, the existing § 493.1489(b)(2)(ii) is redesignated and reformatted as § 493.1489(b)(3)(ii)).

In addition to the degrees discussed previously in this rule, we proposed a new framework for evaluating non-traditional degrees, a part of the educational algorithm described previously. One example of a non-traditional degree may be a Regents Bachelor of Arts (RBA), which is a baccalaureate degree program designed for adult students. The basic principle of an RBA is that credit is awarded for what students know, regardless of how that knowledge was obtained. In other words, students may earn college equivalent credit for work and life experiences that can be equated to college courses. It is designed to provide students with a comprehensive general education. Many times, no specific courses are required for graduation, allowing students to design their own programs of study. This degree is usually awarded by a Board of Regents. It is a general education degree without the designation of a major. Many of these individuals have an associate degree in medical laboratory technology (MLT), but not an appropriate bachelor's degree that would make them eligible to qualify under the provisions in CLIA personnel requirements that require a minimum of a bachelor's degree in specified scientific fields. This becomes problematic because the RBA does not designate a major. Generally, in these cases, we have seen that these individuals have an associate degree in MLT and have many years of clinical laboratory experience. Currently, these individuals cannot meet CLIA personnel qualifications in subpart M that require a minimum of a bachelor's degree. We believe that their education and experience should qualify them to be TCs as long as their associate degree is in medical laboratory technology or laboratory science. Public feedback from the 2018 RFI supported that a non-traditional degree should be considered as a means to meet CLIA requirements for the TC and TP for moderate complexity testing, provided a minimum number of SH were obtained in chemistry, biology, and laboratory sciences. We believe a non-traditional degree can be a means to qualify as TC and TP, provided an adequate number of biology, chemistry or medical laboratory, or clinical laboratory science courses is part of the curriculum in addition to meeting the training or experience requirements. However, we do not believe a nontraditional degree can be a means to qualify as a laboratory director.

At § 493.1405(b)(6) through (7), we proposed removing the ''grandfather'' provisions as these requirements had to

have been met by February 28, 1992. Individuals can no longer qualify under these provisions. A grandfather is a provision in which a previous rule would continue to apply to individuals already qualified and employed in the given personnel capacity upon implementing a new rule. The new rule will apply to all individuals seeking to qualify after the implementation of said rule. We proposed to revise paragraph (b)(6) with a new grandfather provision for all individuals who qualified under this provision, as well as § 493.1406, prior to the date of the final rule. We stated in the proposed rule that we intend to allow individuals already qualified and employed in the given personnel capacity as of the date of the final rule to continue to be qualified under the new provisions (that is, grandfathered). However, we stated that we intend to require all individuals becoming employed by a laboratory or changing assignments within a laboratory after the final rule's effective date to qualify under the new provisions. This includes those individuals who may have been previously employed in a given position prior to the effective date but took a break or a leave of absence and came back after the date of the final rule.

We received public comments on these proposed provisions at § 493.1405. The following is a summary of the public comments we received and our responses.

Comment: A commenter suggested a formal recognition of board certification in MT, CLS, MLS, and other subspecialties instead of qualifications based on coursework. The commenter added that accreditation organizations need to recognize board certification because they are not required in the CLIA regulations. According to the commenter, those with ASCP and other certifications are higher qualified laboratory scientists who meet the CLIA minimum. The commenter further stated that it is often easier to obtain certification verification than to prove degree coursework, especially from schools or programs that no longer exist.

Response: We believe this type of documentation is not sufficient evidence of meeting the personnel qualifications. We have found that the certifying boards may certify individuals as MT, CLS, and MLS with a variety of degrees if they meet an educational algorithm. Their coursework may not meet the minimum CLIA personnel requirements, but there may be enough science classes to sit for the examination and be certified as an MT, CLS, or MLS. In addition, not all certifying boards have the same requirements for certification. We will continue requiring detailed information, such as degrees, transcripts, or Primary Source Verification (PSV) documents, to verify educational credentials per the policy memorandum, S&C: 16–18–CLIA (*https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-18.pdf*).

Comment: Several commenters noted the 2022 decision by AMT, ASCP, and ASCLS to change the MT certification designation to MLS. The commenters suggested that medical laboratory science should be used in addition to clinical laboratory science throughout the CLIA personnel qualifications.

Response: We agree with the commenters that medical laboratory science should be included in the revised personnel qualifications. We are incorporating the change suggested by the commenters where applicable in revised § 493.1405 and other applicable sections of subpart M.

Comment: Many commenters agreed with the removal of ''physical science'' as a degree. A commenter stated that defining specific courses of study which must be completed to qualify as a LD (that is, biochemistry or organic chemistry; molecular biology, cell biology, or genetics) unfairly discriminates against degree programs that impart the necessary knowledge to perform the duties of LD but do not include these specific courses. The commenter added that foreign and alternative degrees might also prepare a person to perform the LD duties better than degree programs that have those specific courses.

Response: We believe it is important that individuals lacking a traditional degree in chemical, biological, clinical, or medical laboratory science or medical technology should be considered if they have completed the coursework equivalent to the aforementioned traditional degrees and acquired documentation of the equivalent educational coursework. In response to the 2018 RFI (83 FR 1005 through 1006, 1008), commenters recommended that we evaluate coursework taken using an SH educational algorithm to qualify individuals for CLIA personnel positions. CLIAC also stated that degrees (such as those in the humanities, physical sciences, and others) might require the requisite science coursework. The courses indicated in the proposed algorithm meet the CLIAC recommendation for courses with laboratory components relevant to clinical laboratory testing.

Comment: A commenter opposed lowering of educational standards for LD and disagreed with the proposal to add a qualification pathway for moderate and high-complexity LD that includes an educational algorithm for an individual that does not have an earned doctoral degree in a chemical, biological, or clinical laboratory science or medical technology. The commenter suggested that a doctorate-level or medical doctor degree should be the minimum educational qualification for LD, given the importance of the role of overseeing the overall management and operations of the clinical laboratory.

Response: We agree that the doctoral degree algorithm requires, at a minimum, a doctoral degree and therefore are revising proposed § 493.1405(b)(3)(ii)(A) (finalized at § 493.1405(b)(3)(i)(B)) to specify that the individual must have an earned doctoral degree for purposes of the doctoral degree algorithm. However, we do not agree that LDs of a laboratory performing moderate-complexity testing require a doctoral degree. Since 1992 the CLIA LD qualifications for laboratories performing moderate complexity testing (§ 493.1405) have provided pathways for individuals with a master's or bachelor's degree to qualify as moderate complexity LD. The proposed moderate complexity LD qualifications for master's and bachelor's degrees courses indicated in the proposed algorithm meet the CLIAC recommendation for courses with laboratory components relevant to clinical laboratory testing.

In this final rule, consistent with our proposed and final policy, we are also reformatting proposed § 493.1405(b)(3) to clarify that both individuals qualifying with a traditional doctoral degree and those qualifying under the new educational pathway, must have the specified 20 CE credit hours, certification, and experience. As we explained in the July 2022 proposed rule (87 FR 44914), these requirements apply to individuals qualifying with doctoral degrees. We are also reformatting proposed § 493.1405(b)(4) and (5) to clarify that individuals qualifying with a traditional master's or bachelor's degree and those qualifying under the new educational pathway must all have the required laboratory training or experience and CE credits, as we discussed in the July 2022 proposed rule (87 FR 44915–44916).

Also at § 493.1405(b)(4)(i)(C)(*2*) of this final rule we are revising to clarify that under this educational pathway, 16 semester hours in a combination of graduate level coursework in specified subjects and a thesis or research project related to CLIA laboratory testing is required. At the final regulations at both

§ 493.1405(b)(3)(i)(B)(*2*) and (b)(4)(i)(C)(*2*), we are clarifying that for those who qualify with a thesis or research project, that thesis or research project must be approved, meaning the individuals must have received credit for it as reflected on their transcript. CMS's policy is to verify educational qualifications by reviewing transcripts, as described in its Survey and Certification Memorandum 16–18–CLIA, *Personnel Policies for Individuals Directing or Performing Non-waived Tests* at 2–4 (April 1, 2016), available at *https://www.cms.gov/medicare/provider-enrollment-and-certification/surveycertificationgeninfo/policy-and-memos-to-states-and-regions-items/survey-and-cert-letter-16-18.*

We are also making technical changes in this section of the regulatory text in this final rule to enhance consistency.

After consideration of public comments, we are finalizing the proposed provisions at § 493.1405, with the following modifications:

- To specify at § 493.1405(b)(3)(i)(B) that for purposes of the doctoral degree algorithm, an individual must hold an earned doctoral degree,
- To reformat the regulations at § 493.1405(b)(3) through (5).
- To revise § 493.1405(b)(3)(i)(B)(*2*) and (b)(4)(i)(C)(*2*) as described previously.
- To include medical laboratory science in § 493.1405 where applicable.

4. Laboratory Director Qualifications on or Before February 28, 1992 (§ 493.1406)

At § 493.1406, we proposed removing the grandfather provision for these requirements as they had to have been met by February 28, 1992. Individuals can no longer qualify under these provisions. We stated in the proposed rule that we plan to grandfather all individuals qualified under this provision prior to the date of the final rule under § 493.1405(b)(6). All individuals qualifying after the date of the final rule will be required to qualify under the new provisions.

We received no public comments on this provision and are finalizing the proposed removal of § 493.1406.

5. Laboratory Director Responsibilities (§ 493.1407)

At §§ 493.1407(c) and 493.1445(c), we proposed revising the requirements so that the LD must be on-site at the laboratory at least once every 6 months, with at least a 4-month interval between the two on-site visits. However, LDs may elect to be on-site more frequently. The laboratory must provide documentation of these visits, including evidence of performing activities that are part of the LD responsibilities. We concur with CLIAC's recommendation that LDs should make at least two (reasonably spaced) on-site visits to each laboratory they direct per year. We stated that we would expect the on-site visits to be once every 6 months with an interval of at least 4 months between the two on-site visits. We will continue to require that the LD be accessible to the laboratory to provide telephone or electronic consultation as needed. Based on a review of information provided by State agencies, AOs, and ESs, onsite LD visits are required as follows:

- 19 percent (n=10 of 54), meaning 9 non-exempt States plus 1 territory require on-site visits out of 54 States and territories;
- 43 percent (n=3 of 7) AOs; and
- 50 percent (n=1 of 2) ES.

CLIA statistics show that LD citations are consistently among the top 10 condition level- deficiencies cited by surveyors.[21] Feedback from the States, AOs, and ES indicated that the number of deficiencies cited at the time of the survey was less when the LD was on-site full-time or made regular on-site visits. Based on anecdotal information from the State agencies, ES, and AOs, the laboratories that did not have a LD who made regular visits to the laboratory tended to have an increased number of citations related to overall noncompliance with laboratory requirements. Some States currently require on-site LDs to visit their laboratory at prescribed intervals, while others do not (see Table 10 for a complete list of States and territories). Feedback from States and AOs that did not have such a requirement for on-site visits, generally supported the addition of a requirement for on-site visits. Further, on-site visits are meant to supplement regular interactions between off-site directors and the lab (for example, by telephone or other telepresence). We concur with CLIAC's recommendations that clear documentation of LD on-site visits should demonstrate the laboratory is in continuous compliance with current laws and regulations, including but not limited to the assessment of the physical environment for safe laboratory testing. The on-site LD visits cannot be delegated. We believe adding the on-site requirement supports increased compliance for laboratories.

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[21] *https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Downloads/CLIAtopten.pdf.*

TABLE 10: State and Territorial Requirements for On-site Laboratory Directors Every 6 Months

Requirement for On-site Laboratory Directors Every 6 Months	Do not Require On-site Laboratory Directors Once Every 6 Months
Georgia	Alabama
Hawaii	Alaska
Maine	American Samoa (territory)
Maryland	Arkansas
Nevada	Arizona
New York*	California
Oklahoma	Colorado
Pennsylvania	Connecticut
Rhode Island	Delaware
Tennessee	District of Columbia
Puerto Rico (territory)	Florida
	Guam (territory)
	Idaho
	Illinois
	Indiana
	Iowa
	Kansas
	Kentucky
	Louisiana
	Massachusetts
	Michigan
	Minnesota
	Mississippi
	Missouri
	Montana
	North Carolina
	North Dakota
	Nebraska
	New Hampshire
	New Jersey
	New Mexico
	Ohio
	Oregon
	Saipan (territory)
	South Carolina
	South Dakota
	Texas
	Utah
	Vermont
	Virginia
	Virgin Islands (territory)
	Washington**
	West Virginia
	Wisconsin
	Wyoming
N=9 States + 1 US territory, 1 ES*	N=40 States,4 US territories, + District of Columbia, 1 ES**

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We received public comments on these proposals at § 493.1407. The following is a summary of the public comments we received and our responses.

Comment: Several commenters requested clarification regarding the definition of a laboratory site visit. One commenter noted that there could be several physician offices, outpatient clinics, hospital rooms, operating rooms, and other settings performing moderate complexity testing under a single CLIA certificate. The commenter questioned if the LD on-site visit

pertains to all locations under a single CLIA certificate or just a single site. Another commenter was concerned that the proposed language regarding LD site visit requirements does not exempt CLIA home office sites. The commenter stated that existing and proposed CMS regulations still consider CLIA home office sites as 'laboratories,' which is inconsistent with common sense definitions of the non-laboratory activities occurring at these locations and suggested that CMS update and streamline regulations to accurately reflect the minimal scope of activities occurring at these home office locations. Another commenter noted that no data nor statistics were provided to support the perception that clinical laboratories with more regular on-site LD presence have fewer quality issues or lower number of deficiencies than those with less on-site LD presence. The commenter requested flexibility concerning the timeframes for the proposed visits by the CLIA LD to each of the clinical laboratories and suggested one on-site visit for laboratories with a limited scope of specialties (three or less) and a low volume of tests (2,000–10,000 per year), flexibility with the 4-month separation between 6-month visits, and allowance for virtual visits as an option also to meet the proposed requirement, which it stated would be economically and logistically beneficial.

Response: CLIAC recommended that LDs make at least two (reasonably spaced) on-site visits to each laboratory they direct annually. As noted in the proposed rule, some States require on-site LDs to visit their laboratories at prescribed intervals. In contrast, others do not, and feedback from States and AOs that did not have such a requirement for on-site visits generally supported the addition of a requirement for on-site visits. The on-site visit requirement pertains to only one location site visit per CLIA certificate. However, LDs may elect to be on-site more frequently. If a home office is used under the oversight of a primary laboratory CLIA certificate, then that primary site's LD will determine if the home office should be included in the on-site inspection. If a home office holds its own CoC or CoA, the LD must inspect those sites at the frequency specified in this final rule.

Comment: A commenter requested clarification regarding the LD requirement to document the visits and include evidence of performing activities.

Response: As currently required by CLIA under § 493.1407(e), the LD must ensure that the laboratory is in continuous compliance with current laws and regulations. The documentation required in the final § 493.1407(c) must be sufficient for the LD to demonstrate compliance with this provision. The LD determines the type or process of documentation needed as evidence of performing visits. Documentation may include, but is not limited to, sign in/sign out logs, meeting minutes/summary, notes of observations, and travel vouchers.

After consideration of public comments, we are finalizing the proposed provisions at § 493.1407(c) without modifications.

6. Technical Consultant Qualifications (§ 493.1411)

As discussed in section III.B.3. of the proposed rule, we proposed to amend § 493.1411(b)(1)(ii) by removing ''or possess qualifications that are equivalent to those required for such certification.''

As discussed in section III.B.17. of the proposed rule, we proposed to amend § 493.1411(b)(3)(i) by removing an earned doctoral, master's, or bachelor's degree in ''physical science'' as a means to qualify. We further proposed to redesignate current paragraph (b)(3)(ii) as paragraph (b)(3)(iii). Then, we proposed to revise paragraph (b)(3)(i) by changing the ''and'' to an ''or'' and to add a requirement at new paragraph (b)(3)(ii) to meet either § 493.1405(b)(3)(ii) or (b)(4)(ii) or (iii) to allow individuals who do not have a chemical, biological, or clinical laboratory science or medical technology degree to be eligible to qualify as a TC using the educational algorithm. (As discussed later in this section of the final rule, these provisions in the proposed rule at § 493.1411(b)(3) are being reformatted and finalized at revised (b)(3)(i) and (ii).)

As discussed in section III.B. 17 of the proposed rule, we proposed to revise § 493.1411(b)(4)(i) by removing a doctoral, master's, or bachelor's degree in ''physical science'' as a means to qualify, and adding an earned doctoral, master's, or bachelor's degree in ''clinical laboratory science'' as a means to qualify. At § 493.1411(b)(4), we proposed changing the ''and'' to an ''or'' in paragraph (b)(4)(i). We also proposed to redesignate current paragraph (b)(4)(ii) as paragraph (b)(4)(iii) and to add a new paragraph (b)(4)(ii) to state that the individual must meet the criteria in § 493.1405(b)(5)(ii) (finalized in this final rule at § 493.1405(b)(5)(i)(B)) to allow individuals who do not have a chemical, biological, or clinical laboratory science or medical technology degree to be eligible to qualify as a TC using the educational algorithm. We stated we would also redesignate the current § 493.1405(b)(5)(ii) as § 493.1405(b)(5)(iii) and added an ''or'' following proposed § 493.1405(b)(5)(i). (As discussed later in this section of the final rule, these provisions in the proposed rule at § 493.1411(b)(4) are being reformatted and finalized at the revised (b)(4)(i) and (ii).)

At § 493.1411(b), we proposed adding a requirement at paragraph (b)(5) to allow individuals with an associate degree in medical laboratory technology or clinical laboratory science and at least 4 years of laboratory training or experience, or both, in nonwaived testing and the designated specialty or subspecialty areas of service for which the TC is responsible for qualifying as TCs. As discussed in section I.B. of the proposed rule, CLIAC recommended that we modify CLIA requirements to add the option for individuals with an associate degree to qualify as TCs. We concur with the CLIAC recommendation. In general, this will allow individuals who may have an applicable associate degree in addition to required training or experience, or both, to qualify as TCs. We recognize that the current personnel qualifications for general supervisors (GS) for high complexity testing may be less stringent than those of TCs for moderate complexity testing. The current CLIA regulations allow an individual with an associate degree (§ 493.1461) to perform CA on high complexity TP (see §§ 493.1461(c)(2), 493.1489(b)(2)(i)). The regulations under moderate complexity state that the TC is responsible for CA and does not allow delegation of this responsibility to any individual. The high complexity regulations allow the LD or TS to delegate the CA to the GS. However, the same individual cannot perform CA on TP for moderate complexity testing unless they can qualify as a TC. Therefore, if a laboratory performs both moderate and high complexity testing, a GS can only perform CA on moderate complexity TP if they can meet the regulatory requirements of a TC. The proposed change would allow individuals with applicable associate degrees to assess competency in laboratories that perform both moderate and high complexity testing and bring parity to who performs CA for all nonwaived laboratories while maintaining the laboratory's ability to produce accurate and reliable testing.

At § 493.1411(b), we proposed adding a requirement at paragraph (b)(6) to allow individuals who are qualified

under § 493.1411(b)(1), (2), (3), or (4) or have earned a bachelor's degree in respiratory therapy or cardiovascular technology from an accredited institution and have at least 2 years of laboratory training or experience, or both, in blood gas analysis to qualify as TC for blood gas testing only. Most blood gas testing was categorized as high complexity when the original regulations were finalized in the February 1992 final rule with comment period. Due to improved technology, most routine blood gas testing is now categorized as moderate complexity. We proposed this change because we believe that it would provide adequate oversight of moderate complexity blood gas testing. Adding this provision specific to TCs in the area of blood gas testing would allow individuals to qualify as a TC in this specific area of expertise. Please note that we will still not consider a degree in respiratory therapy (RT) or cardiovascular technology to be equivalent to a biological or chemical science degree. However, an individual with a degree in either respiratory or cardiovascular therapy would be able to oversee the testing and CA of only those personnel who perform blood gas testing.

At § 493.1411(b)(7), we proposed adding a grandfather provision to include those already qualified prior to the date of the final rule, including nurses.

We received public comments on these proposals at § 493.1411. The following is a summary of the public comments we received and our responses.

Comment: Several commenters supported the proposed TC qualification route for an associate degree in medical laboratory technology or clinical laboratory science and at least 4 years of laboratory training or experience, or both, in nonwaived testing and the designated specialty or subspecialty areas of service for which the TC is responsible for qualifying as TCs.

Response: We appreciate the commenters' support and are finalizing these proposed changes with modification, to include medical laboratory science in addition to medical laboratory technology and clinical laboratory science as degree paths, when applicable, as discussed in response to comments in section III.C.3. of this rule.

Comment: Several commenters supported the proposal to include a bachelor's degree in respiratory therapy or cardiovascular technology from an accredited institution to the TC qualifications for blood gas analysis. Additional commenters requested clarification on the proposed requirement for 2 years of laboratory training and experience for TCs that earned a bachelor's degree in respiratory therapy or cardiovascular technology from an accredited institution. The commenter inquired if the 18 months of clinical experience acquired during respiratory therapy school would count towards the required 2 years. The commenter stated that requiring an additional 6 months of training and education may limit hiring respiratory therapists (RT) directly from programs. The commenter added that if clinical rotations during RT school do not count toward the required 2 years of laboratory training and experience, then all newly graduated RTs would be prevented from performing blood gas analysis which is an essential function in the hospital setting. Another commenter suggested that instead of requiring 2 years of laboratory training and experience, RTs must be graduates of professionally accredited respiratory therapy or pulmonary technology programs. The commenter added that RTs are sufficiently trained and proficient in arterial puncture, blood gas collection, analysis, and interpretation, ensuring the quality and accuracy of collected samples. These commenters agreed that blood gas analysis is an integral part of emergency and critical patient care decision-making that requires immediate collection, analysis, and results reporting, and stated that the proposed changes will prevent newly graduated RTs from obtaining the necessary experience and will impose further strains on hospitals to find qualified personnel when there is already a severe shortage nationwide.

Response: The current and proposed TC qualifications for a bachelor's degree also require at least 2 years of laboratory training or experience or both in nonwaived testing in the designated specialty or subspecialty areas of service for which the technical consultant is responsible. The proposed TC qualifications for blood gas analysis parallel these requirements by including the two-year requirement of laboratory training or experience in blood gas analysis for a bachelor's degree in respiratory therapy or cardiovascular technology from an accredited institution. We believe it is important for a TC in blood gas analysis to have at least 2 years of laboratory training or experience to be consistent with the qualification requirements for general TCs. The 18 months of clinical rotations acquired during respiratory therapy or pulmonary technology school may count towards the requirement for 2 years of laboratory training and experience.

In this final rule, consistent with our proposed and final policy, we are also reformatting proposed § 493.1411(b)(3) and (4) to clarify that individuals qualifying with a traditional doctoral, master's or bachelor's degrees and those qualifying under the new educational pathway must all have the required years of laboratory training or experience. As we discussed in the proposed rule, all individuals qualifying through an educational pathway must also meet training and/or experience requirements.

We are also updating the regulatory cross-reference at finalized § 493.1411(b)(3)(i)(B) and (b)(4)(i)(B) for consistency with the reformatting of the final regulations in this section.

After consideration of public comments, we are finalizing the proposed changes to § 493.1411(b), with the following modifications:

- To add medical laboratory science where applicable in this section.
- To reformat the regulations at § 493.1411(b)(3) and (4).
- To update the regulatory cross-references at § 493.1411(b)(3)(i)(B) to ''§ 493.1405(b)(3)(i)(B) or (b)(4)(i)(B) or (b)(4)(i)(C)''.
- To update the regulatory cross-reference at § 493.1411(b)(4)(i)(B) to § 493.1405(b)(5)(i)(B).

7. Testing Personnel Qualifications (§ 493.1423)

We proposed redesignating § 493.1423(b)(2), (3), and (4) as § 493.1423(b)(4), (5), (6), respectively.

We also proposed separating current paragraph (b)(1) into two separate provisions. Revised paragraph (b)(1) would include the current requirement of a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located. New paragraph (b)(2) would include the requirement of an earned doctoral, master's, or bachelor's degree in a chemical, biological, or clinical laboratory science or medical technology from an accredited institution. As discussed in section III.B.17. of the proposed rule, we proposed removing an earned doctoral, master's, or bachelor's degree in ''physical science'' as a means to qualify. In addition, we proposed adding an earned doctoral, master's, or bachelor's degree in nursing as a means to qualify. In Survey and Certification memo 16–18–CLIA,[22] we stated that ''a

[22] *https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/*

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bachelor's in nursing meets the requirement of having earned a bachelor's degree in a biological science for high complexity TP'' and that ''an associate degree in nursing meets the requirement of having earned an associate degree in a biological science for moderate complexity TP.'' We stated in the proposed rule that we appreciate all comments received in response to the 2018 RFI and agree that a nursing degree is not equivalent to a biological or chemical science degree. We further stated that we also concur with some commenters' recommendation that nursing degrees be used as a separate qualifying degree for TP. As testing practices and technologies have evolved, point of care testing has become a standard of practice in many health care systems, allowing laboratory results to be delivered to the treating health care provider as rapidly as possible. We recognize that in many health care systems, nurses perform the majority of the point of care testing in many different scenarios (for example, bedside, surgery centers, end-stage renal disease facilities). We stated that we do not have any reason to believe that nurses would be unable to accurately and reliably perform moderate and high complexity testing with appropriate training and demonstration of competency.

We proposed adding new paragraph (b)(3) to include the requirement that the individual must meet the criteria in § 493.1405(b)(3)(ii), (b)(4)(ii), (b)(4)(iii) or (b)(5)(ii) (finalized in this final rule at § 493.1405(b)(3)(i)(B), (b)(4)(i)(B), (b)(4)(i)(C), and (b)(5)(i)(B)) to allow individuals who do not have a chemical, biological, or clinical laboratory science or medical technology degree to be eligible to qualify as a TP using the educational algorithm. See discussion in section III.B.3. of the proposed rule.

In addition, we proposed adding at paragraph (b)(7) a requirement to allow individuals who perform blood gas testing to be qualified under § 493.1423(b)(1) through (4) or have earned a bachelor's degree in respiratory therapy or cardiovascular technology from an accredited institution or have an associate degree related to pulmonary function and have at least 2 years training or experience or both in blood gas analysis. We proposed this addition so that parity can exist with high complexity TP requirements for blood gas testing at § 493.1489(b)(6). See previous discussion at § 493.1411(b).

We received public comments on these proposals at § 493.1423. The following is a summary of the public comments we received and our responses.

Comment: Many commenters opposed the proposed addition of a nursing degree to qualify as testing personnel in laboratories that are performing moderate complexity testing. Many commenters noted that the proposed rule stated that responses to the RFI did not concur that nursing degrees were equivalent to biological or chemical sciences degrees, and the majority of the commenters on the proposed rule agreed, stating that there is very little laboratory science coursework in a nursing degree program. Commenters agree that nursing professionals are highly skilled and extremely valuable members of the healthcare workforce. However, commenters stated their education and training do not emphasize the skills needed to accurately perform moderate and high complexity testing, which, by their definition, have a higher degree of potentially negative impact on the patient if performed incorrectly. Commenters noted the specific laboratory science courses that laboratory technicians and medical laboratory scientists must complete in contrast to the single chemistry course required by many nursing degrees. Others added that nursing coursework does not provide the knowledge to understand and correctly perform moderate and high complexity testing, including the fundamental aspects of clinical laboratory testing such as QC, delta checks, specimen integrity, confounding variables, chemical interactors/inhibitors, and many other relevant topics required to carry out these higher levels of testing accurately. Many commenters agreed that POC testing is not equivalent to moderate or high complexity testing and stated that allowing anyone to work in a clinical laboratory without the proper training will put patients at risk. Many commenters provided examples of personal situations where an individual with a nursing degree was unable to accurately perform or understand clinical laboratory testing, including POC tests. Others commented that both nursing and laboratory fields are facing national workforce shortages, and nursing professionals are already overburdened with additional duties.

Response: We recognize that many interested parties do not consider a nursing degree equivalent to a chemical, biological, clinical or medical laboratory science, or medical technology degree. However, since 2016, CMS has considered nursing degrees equivalent to biology degrees. In Survey and Certification memo 16–18–CLIA, we stated that ''a bachelor's in nursing meets the requirement of having earned a bachelor's degree in a biological science for high complexity TP'' and that ''an associate degree in nursing meets the requirement of having earned an associate degree in a biological science for moderate complexity TP.'' As stated in the proposed rule, POC testing has become a standard of practice in many healthcare systems, allowing laboratory results to be delivered to the treating healthcare provider as rapidly as possible. We recognize that in many healthcare systems, nurses perform the majority of the POC testing in many different scenarios (for example, bedside, surgery centers, and end-stage renal disease facilities). Our experience since 2016 demonstrates that nurses with appropriate training and demonstration of competency are able to accurately and reliably perform moderate complexity testing. We also recognize that in response to the RFI, many interested parties suggested nursing degrees could be used as a separate qualifying degree for nonwaived testing personnel. We therefore proposed to incorporate a pathway for nursing degree candidates to qualify as testing personnel in laboratories performing moderate complexity testing. As with all testing personnel, the laboratory director is responsible for ensuring that before testing patient specimens, all personnel have the appropriate training, and can demonstrate that they can perform all testing operations reliably to provide and report accurate results. Under this final rule, individuals with nursing degrees will only be able to qualify for personnel positions listed in subpart M when a nursing degree is specifically listed in the regulatory qualifications. For example, revised § 493.1423 includes nursing degrees for moderate complexity testing personnel. However, individuals with nursing degrees will no longer be able to qualify as LDs as nursing is not listed as a qualifying degree under revised § 493.1405(b).

We note that as discussed in the proposed rule, our intent is to allow individuals already qualified and employed in a given personnel capacity as of the date of the final rule to continue to be qualified under the new provisions (that is, grandfathered), provided they are continuously employed in their position after the

SurveyCertificationGenInfo/Policy-and-Memos-to-States-and-Regions-Items/Survey-and-Cert-Letter-16-18.html?DLPage=1&DLEntries=10&DLFilter=16-18&DLSort=3&DLSortDir=descending.

effective date. We proposed grandfathering provisions at §§ 493.1405(b)(6), 493.1411(b)(7), 493.1443(b)(4), 493.1461(c)(4), 493.1483(b)(3), and 493.1489(b)(5), but inadvertently omitted the applicable grandfather provisions in §§ 493.1423 and 493.1449. We are including those provisions in this final rule at §§ 493.1423(b)(8) and 493.1449(j), respectively. Like the other new grandfather clauses, this one allows individuals already qualified and employed in the applicable personnel position as of the effective date of the final rule to continue to be qualified under the new provisions provided the individuals remain continuously employed in their position after the effective date.

Comment: A commenter suggested a definition for ''blood gas testing'' to indicate if it includes oxygen saturations and co-oximetry testing as well as to include or exclude venous and capillary gases since arterial samples are the most common sample type but not defined in the proposed change. The commenter stated that emergency medical technicians need to run blood gases during critical patient transport and may not qualify as testing personnel. The commenter stated that critical patients need hands-on life-saving support and that a trained, competent, and experienced high school diploma testing personnel should be allowed to run a blood gas test in a POC device.

Response: CLIA allows moderate complexity testing personnel to qualify with a high school diploma or equivalent and documented training of the testing performed prior to reporting patient test results. Individuals who meet the regulatory qualifications for moderate complexity can perform any test categorized by the FDA as moderate complexity, including blood gases. No change is necessary to the regulations.

Comment: As discussed in the comment section for the proposed changes to the technical consultant qualifications, several commenters requested clarification on the proposed requirement for 2 years of laboratory training and experience for RTs and inquired if the 18 months of clinical experience acquired during respiratory therapy school would count towards the required 2 years.

Response: The 18 months of clinical rotations acquired during respiratory therapy or pulmonary technology school may count towards the proposed requirement for 2 years of laboratory training and experience.

In this final rule, we are also adding ''laboratory'' where training is required at proposed § 493.1423(b)(6)(ii) and (b)(7)(iii)(B) to clarify the type of acceptable training, consistent with the new definition of ''laboratory training or experience'' at 42 CFR 493.2 and related discussion in the July 2022 proposed rule at 87 FR 44911–44913 that training and experience must be in a CLIA laboratory (87 FR 44911–44913). We are reformatting § 493.1423(b)(7) to clarify that there are three distinct pathways to qualify as testing personnel for blood gas analysis under this subsection as discussed in the July 2022 proposed rule (87 FR 44919–44920). We are correcting and updating cross-references in the regulatory text where necessary for consistency with the reformatting of the final regulations.

As previously discussed, we are adding the grandfathering clause in this final rule at § 493.1423(b)(8). Like the other new grandfather clauses, this one allows individuals already qualified and employed as moderate complexity testing personnel as of the effective date of the final rule to continue to be qualified under the new provisions provided the individuals remain continuously employed in their position after the effective date.

We are also making technical changes in this section of the final regulations to enhance consistency.

After consideration of the comments received, we are finalizing the proposed provisions at § 493.1423, with the following modifications:

- To include medical laboratory science where applicable, as discussed previously in this section.
- To reformat the regulations at § 493.1423(b)(7).
- To update the regulatory cross-references at § 493.1423(b)(3).
- To add ''laboratory'' where training is required as reflected at § 493.1423(b)(6)(ii) and (b)(7)(iii)(B).
- To add the grandfathering clause in the final regulatory text at § 493.1423(b)(8).

8. Laboratory Director Qualifications (§ 493.1443)

As discussed in section III.B.3. of the proposed rule, we proposed to amend § 493.1443(b)(1)(ii) by removing ''or possess qualifications that are equivalent to those required for such certification.'' Also, as discussed in section III.B.3. of the proposed rule, we proposed to amend § 493.1443(b)(2) by removing the residency requirement at paragraph (b)(2)(i) as a means to qualify and redesignating at paragraph (b)(2)(ii) (which requires the individual to have at least 2 years of experience directing or supervising high complexity testing). In addition, we proposed adding a new paragraph (b)(2)(ii), to require 20 CE credit hours. (As discussed later in this section of the final rule, these provisions in the proposed rule at (b)(2) are being reformatted and finalized at the revised (b)(2)(i) through (iii)).

We proposed redesignating current paragraph (b)(3)(i) as new paragraph (b)(3)(iii) and redesignating the provisions of paragraphs (b)(2)(ii)(A) and (B) as new paragraphs (b)(3)(iv). (As discussed later in this section of the final rule, these provisions in the proposed rule at (b)(3) are being reformatted and finalized at the revised (b)(3)(i) through (iv)).

As discussed in section III.B.17 of the proposed rule, we proposed redesignating the introductory text of paragraph (b)(3) as new paragraph (b)(3)(i) to revise this paragraph by removing an earned doctoral, master's, or bachelor's degree in ''physical science'' as a means to qualify. As discussed in section III.B.8. of the proposed rule, we would revise newly redesignated paragraph (b)(3)(i) by adding an earned doctoral degree in ''medical technology'' as a means to qualify. (As discussed later in this section of the final rule, this provision in the proposed rule at (b)(3)(i) is being reformatted and finalized at (b)(3)(i)(A)).

As discussed in section III.B.8 of the proposed rule, we proposed adding an educational requirement at new paragraph § 493.1443(b)(3)(ii) that includes a qualification algorithm for an individual that does not have an earned doctoral degree in a chemical, biological, or clinical laboratory science or medical technology. As discussed in this section of the final rule, this provision in the proposed rule at (b)(3)(ii) is being reformatted and finalized at (b)(3)(i)(B).

At paragraphs § 493.1443(b)(3)(ii) and (b)(4) and (5), we proposed deleting these paragraphs to remove the grandfather provisions as these requirements had to have been met by February 24, 2003, March 14, 1990, and February 28, 1992, respectively, and individuals can no longer qualify under these provisions. We proposed adding a new paragraph (b)(4) to specify the new grandfather provision. We also proposed redesignating paragraph (b)(6) as new paragraph (b)(5).

Finally, as discussed in section III.B.3. of the proposed rule, we proposed adding a 20 CE credit hour requirement at new paragraph § 493.1443(b)(3)(v). As discussed in this section of the final rule, this provision in the proposed rule at (b)(3)(v) is being reformatted and finalized at (b)(3)(iv).

We received public comments on these proposals at § 493.1443. The

following is a summary of the public comments we received and our responses.

Comment: Many commenters opposed the proposed addition of an educational requirement that includes a qualification algorithm for an individual with a master's degree equivalency that does not have an earned doctoral degree in a chemical, biological, or clinical laboratory science or medical technology to qualify as a high complexity laboratory director (HCLD). Commenters stated that doctoral-level HCLDs are critical in ensuring high-quality, appropriate patient care. HCLDs are responsible for overseeing all clinical and scientific aspects and related operational aspects of the laboratory. Their responsibilities include introducing, developing, validating, implementing, and interpreting laboratory tests. Commenters added that any pathway to high complexity laboratory directorship, such as the proposed master's degree equivalence that bypasses Ph.D.-level training, could jeopardize patient care and does not acknowledge the importance of scientific and medical expertise essential to becoming a qualified HCLD. Another commenter stated that the limited exposure that a master's degree candidate receives is insufficient to serve as an HCLD noting that running a high complexity laboratory requires critical thinking and subject matter expertise. Several commenters stated that the master's degree does not provide the rigorous research component required by most doctoral programs. They indicated that research is critical to developing and refining the techniques and skills that are needed by the HCLD to serve their patients. They stated that this research component allows the person to think independently, identify and troubleshoot analytical problems that can affect the clinical interpretation, and provides them the competencies to develop and validate new tests, and much more. Another commenter noted that HCLDs' key responsibilities include analytical method selection for either replacing an outdated methodology or introducing a new one; communication with peer clinical colleagues and effective responses to queries on individual laboratory test results; producing and updating as needed, patient-focused reporting of results that make use of established reference ranges for distinguishing between normal and abnormal results; participation in regional, national or international discussion panels to review testing issues such as QC best practices, selection of best performing analytical methods; and presentation of studies that evaluate the overall clinical performance of tests and their robustness in practice. The commenter stated that master's degree program requirements do not meet the CLIA qualifications for a HCLD. The commenters opposed the proposed lowering of the HCLD qualifications to include a master's equivalency pathway. Some commenters stated that a doctoral-level or medical doctor degree should be the minimum educational qualification for a HCLD, given the importance of the role of overseeing the overall management of high complexity testing and laboratory operations of the clinical laboratory.

Response: We agree with the commenters that a medical or doctoral degree should be required as the minimum educational qualifications for a LD in laboratories performing high complexity testing. Therefore, we are revising § 493.1443(b)(3) as proposed to specify that the individual must have an earned doctoral degree for purposes of the doctoral degree algorithm. The current CLIA LD qualifications for laboratories performing high complexity testing (§ 493.1443) provide a pathway for individuals with a doctor of medicine, doctor of osteopathy, doctor of podiatric medicine, or an earned doctoral degree. We agree that this will remain unchanged under the final rule.

Comment: Several commenters opposed the proposed inclusion of the DCLS as a doctoral degree qualification for HCLDs. Commenters stated several reasons for their opposition, including what they stated was the lack of a rigorous research component similar to what doctoral programs require. One commenter noted that most HCLDs have additional post-doctorate fellowship experience with rigorous clinical and operational training research specifically focused on their dedicated specialty. They stated that this research training is critical to developing and refining the techniques and skills an HCLD needs to serve their patients, including identifying and addressing problems affecting clinical interpretation and developing and validating new tests. Commenters also stated that individuals holding a Ph.D. have post-doctoral experience in laboratory medicine, are board-certified and are professionally qualified as an HCLD. Commenters indicated that the DCLS degree is focused primarily on laboratory management with little concentration on laboratory testing or processes. One commenter was not aware of any organization that certifies the DCLS candidates as competent in laboratory medicine. Commenters also noted that an HCLD must have a wide range of knowledge in both analytical and clinical laboratory medicine and be able to teach pathology residents. In addition to the scientific responsibilities, the administrative duties require the HCLD to prepare an annual report for the laboratory, comply with all the Federal and State requirements, negotiate with the hospital administration a budget, justify new equipment, and hire and keep the laboratory staff. Commenters believed that individuals with a DCLS do not possess the scientific skills to design and interpret analytical assays, interpret unusual laboratory test results, check for interferences in laboratory tests, validate and troubleshoot an assay, decide which instrument, what automation system and what software programs should be used in the laboratory, and discuss key laboratory and clinical issues with clinicians in all fields of medicine. Another commenter stated that DCLS candidates are not required to pass a comprehensive exam before they can complete their research and earn the degree, nor work as a teaching assistant to gain skills needed to give didactic lessons to a class and give presentations at conferences routinely allowing Ph.D. candidates to become competent in addressing issues unique to the high complexity specialties that are not included in DCLS programs. Another commenter was concerned that there might be confusion among the public about the distinctions between a clinical pathologist (MD or DO) and a DCLS, emphasizing that pathologists (MD or DO) are licensed physicians who are trained in pathology to make medical diagnoses and that by their clinical training, including medical school and graduate medical education, and specialty certification in the medical disciplines of anatomic and clinical pathology, pathologists are uniquely best qualified to perform HCLD responsibilities. Commenters added that individuals with DCLS degrees need a more scientific and clinical background to participate in patient care. The commenters believed that finalizing the proposed DCLS qualification for HCLDs will increase the potential for patient harm.

In contrast, we also received many comments in support of the proposed recognition of the DCLS as a recognized doctoral degree to qualify as an HCLD. As noted by many commenters, the DCLS is the only doctorate whose primary specific focus is clinical laboratory testing. These commenters stated that it is the only degree based on

uniform clinical laboratory testing accreditation standards with National Accrediting Agency for Clinical Laboratory Sciences (NAACLS) accreditation. Commenters noted that currently, there are three DCLS programs in the U.S., and each requires laboratory experience (at least 3 years) before admission to the doctoral program. The commenters stated that the ASCP Board of Certification has committed to offering certification for the DCLS and that multiple DCLS graduates have already been board-certified as HCLDs by other HHS-approved certification boards, such as the National Registry of Certified Chemists (NRCC). Many commenters expressed that statements received from several laboratory professional organizations opposing the proposal to include DCLS as HCLD were not based on facts about the DCLS programs. Commenters added that as indicated in the American Society for Clinical Laboratory Science (ASCLS) DCLS Body of Knowledge (BOK), an individual with a DCLS increases diagnostic efficiency, facilitates patient management outcomes, and improves timely access to accurate and appropriate laboratory information by participating directly in patient care decisions, monitoring laboratory utilization, and conducting research on the diagnostic process. The commenters stated that the BOK also outlines professional practice activities related to the five core competencies and the foundational knowledge required for professional practice. A commenter stated that no evidence had been provided that the DCLS is substandard or would be less qualified than current eligible doctorates in this role. The commenter stated that the argument that a Ph.D.-like dissertation is not required of the DCLS is irrelevant since most professional doctorates opt instead for the more important extensive capstone laboratory science experience, culminating in a rigorous scholarly investigation on a relevant topic defended before a doctoral committee. Completing components in the advanced education of laboratory sciences, research, and residency is required for DCLS graduation. A commenter stated that completing the research component of DCLS training results in graduates who can translate research and evidence into best practices and design their research projects to improve patient care goals. DCLS graduates are required to complete institutional review board-approved research for the fulfillment of their degree. The DCLS is typically trained in more than one clinical laboratory area (for example, microbiology, chemistry, hematology, etc.), which helps understand the interrelatedness of laboratory test results. According to the commenters, the DCLS curriculum includes diagnostics, assay development, test interpretation, treatment, problem-solving, quality control, and statistical analysis, all critical elements of HCLD roles. Commenters further stated that contrary to some of the opposition expressed, the DCLS has significant experience in a clinical laboratory, and whether it is considered an advanced practice or entry-level degree makes little difference if the qualifications, competencies, and experiences are in place. Another supporting commenter added that the proposed inclusion of DCLS as HCLD will positively impact workforce shortages by establishing legal legitimacy for advanced practice and improving recruitment and retention of skilled laboratorians to the workforce. Several commenters noted direct experience mentoring or working alongside DCLS graduates during their clinical residency and noted that DCLS graduates provided expert analysis of enterprise-wide laboratory test utilization, proposed interventions to change clinical and operational practices to optimize test use, contributed to multidisciplinary decision-making in test stewardship and other laboratory quality initiatives, provided consultation for optimizing information management, and provided direct laboratory test consultation to healthcare providers in surgical and medical intensive care units. Multiple commenters added that the DCLS practitioner is uniquely qualified to serve in multiple roles, including that of HCLD, because of their broad and advanced knowledge and training across all disciplines of the clinical laboratory (for example, hematology, hemostasis, immunohematology, clinical chemistry, microbiology) as opposed to the limited scope of one clinical discipline in some Ph.D. training programs. Another commenter added that the DCLS's knowledge also provides for developing clinical and reflex test pathways and consultation services that provide knowledge to physicians for better patient management and test ordering as well as for decreasing costs. One commenter noted published article(s) demonstrated laboratory workforce shortages, professional burnout, and low salary and job satisfaction rates and suggested a leadership pathway such as the DCLS could help address these workforce challenges. Another commenter added that including the DCLS as HCLDs is the logical step for career growth for laboratorians. The commenter stated that the technical and scientific expertise of the highly driven laboratory scientist is often lost to nursing programs, physician assistant programs, medical schools, managerial roles relating to business goals, and industry positions. One commenter noted the potential benefits of allowing DCLS holders to serve as HCLDs, particularly in rural/small hospitals and reference laboratories that may not be able to afford an on-site pathologist or whose volume does not warrant the need for an on-site pathologist. The commenter stated that such underserved laboratories/facilities stand to gain by being allowed to hire DCLS graduates as HCLDs, who can serve not only in the capacity of CLIA director but also oversee the day-to-day administrative/supervisory functions. Commenters agreed that with a strong background in clinical science, research, quality management, and cross-functional collaboration, the DCLS professional can positively impact the quality of patient care provided while improving healthcare efficiency. According to these commenters, the DCLS fills a much-needed gap in our healthcare system and will dramatically enhance and promote quality patient care while being a valuable healthcare team member.

Response: The current HCLD qualifications under § 493.1443(b)(3) states that the LD must hold an earned doctoral degree in a chemical, physical, biological, or clinical laboratory science from an accredited institution. In this final rule, we define ''doctoral degree'' to clarify what we mean by the term and to include the DCLS as an acceptable doctoral degree. Our experience under the prior regulations demonstrates that board-certified DCLS graduates are prepared to serve as HCLDs. As stated in the proposed rule, we agree that individuals with a DCLS are experts in clinical laboratory testing. We consider a DCLS an acceptable doctoral degree.

Comment: A commenter suggested that HCLDs should also be certified at a doctoral level in the applicable subdisciplines through the appropriate board (that is, American Board of Medical Microbiology) or in addition to physician (MD or DO) certification in anatomic or clinical pathology.

Response: HCLDs must be qualified to manage and direct laboratory personnel and performance of high complexity testing. HCLDs qualifying as MDs or DOs must be certified in anatomic or clinical pathology, or both, or have appropriate experience directing or supervising high complexity testing.

The current and proposed qualifications for an HCLD with a doctoral degree include certification by a board approved by HHS. Both pathways require only one board certification. For example, if a HCLD is certified by the American Board of Pathology, we do not require additional certification in a subspecialty.

Comment: A commenter suggested that in addition to an earned doctoral degree in a chemical, biological, or clinical laboratory science or medical technology from an accredited institution, there should be a requirement for a completed doctoral dissertation in subjects related to laboratory testing for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of human beings. The commenter stated that such a requirement would ensure that individuals who serve as LDs in laboratories performing high complexity testing have in-person, practical hands-on laboratory training and experience managing complex clinical testing and operations, ultimately ensuring high-quality patient care and safety.

Response: The current and proposed qualifications for an HCLD with a doctoral degree include certification by a board approved by HHS. Board certification and the doctoral degree together ensure the technical competence of medical laboratory professionals.

Comment: A commenter suggested that the grandfather clause(s) be retained in the final rule as that information is useful when determining if an individual qualifies under those routes.

Response: We proposed to remove the current grandfather clauses and add a new clause to indicate that an individual is considered qualified as a LD of high complexity testing under this section if they were qualified and serving as a LD of high complexity testing in a CLIA-certified laboratory as of the effective date of this final rule and have done so continuously since the effective date of this final rule. Also, we added this clause to other applicable sections, as proposed. Prior versions of the CFR are available free online at *https://www.govinfo.gov/app/collection/cfr.*

Comment: A commenter noted that the language in the proposed grandfather clauses indicated that they qualify only if they serve continuously in their position after the final rule's effective date. The commenter stated that this defeats CMS's stated intent to increase the number of eligible candidates needed to perform laboratory testing and is grossly unfair to individuals who qualify under a grandfathering provision and then suffer a break in service of even one day (for example, due to illness, family emergency, or sale of their laboratory) after the final rule is published. The commenter requested a revision to allow breaks in service (for example, 3 years) before an individual had to requalify.

Response: The new provision will allow individuals qualified for specific personnel roles to continue serving in those roles as long as they have continued to perform those duties. The updates to the CLIA personnel requirements in this final rule provide additional pathways for individuals to qualify as personnel for both moderate and high complexity testing. Clarification regarding continuous service will be added to updated guidance.

In this final rule, we are also reformatting proposed § 493.1443(b)(2) to enhance consistency. Consistent with our proposed and final policy, we are also reformatting proposed § 493.1443(b)(3) to clarify that both individuals qualifying with traditional doctoral degrees and those qualifying under the new educational pathway must have the specified 20 CE credit hours, certification, and experience. As we explained in the July 2022 proposed rule (87 FR 44910–44911, 44920), 20 CE credit hours are required to qualify as an LD and individuals qualifying through an educational pathway must also have the required training or experience. In addition, as in the existing § 493.1443(b)(3), individuals qualifying through this subsection must also have the required certification.

We are making technical changes in this section of the regulatory text to enhance consistency.

We are also adding ''approved'' to the final regulatory text at § 493.1443(b)(3)(i)(B)(*2*) to clarify that if individuals are qualifying based on a thesis or research project, that thesis or research project must be approved, meaning the individuals must have received credit for it as reflected on their transcript. CMS's policy is to verify educational qualifications by reviewing transcripts, as described in its Survey and Certification Memorandum 16–18–CLIA, *Personnel Policies for Individuals Directing or Performing Non-waived Tests* at 2–4 (April 1, 2016), available at *https://www.cms.gov/medicare/provider-enrollment-and-certification/surveycertificationgeninfo/policy-and-memos-to-states-and-regions-items/survey-and-cert-letter-16-18.*

After consideration of the comments received, we are finalizing the proposed changes to § 493.1443(b) with the following modifications:

- To include medical laboratory science as discussed previously in sections III.B.1. (§ 493.2) and III.B.3 (§ 493.1405) and to clarify the doctoral degree algorithm by specifying that an individual must hold an earned doctoral degree.
- To reformat § 493.1443(b)(2) and (3).
- To add ''approved'' as reflected at § 493.1443(b)(3)(i)(B)(*2*).

9. Laboratory Director Responsibilities (§ 493.1445)

For proposals related to § 493.1445, please see the discussion in this final rule at sections III.B.5: Laboratory director responsibilities for Laboratories Performing Moderate Complexity Testing (§ 493.1407).

We summarized the public comments related to on-site visits for purposes of both proposed revised § 493.1407 and proposed revised § 493.1445 in this final rule at section III.B.5: Laboratory Director Responsibilities for Laboratories Performing Moderate Complexity Testing (§ 493.1407).

After consideration of the comments received, we are finalizing the proposed changes to § 493.1445(c). In this final rule, we are also correcting and updating the regulatory cross-reference in the current regulations at § 493.1445(e)(10) from § 493.1489(b)(4) to § 493.1489(b)(5) for consistency with the finalized regulations.

10. Technical Supervisor Qualifications (§ 493.1449)

At § 493.1449, we proposed combining the provisions of paragraphs (c) through (g) into new paragraph (c) and combining paragraphs (h) through (j), (n), and (q) into a new paragraph (d). We also proposed redesignating paragraphs (k), (l), (m), (o), and (p) as paragraphs (e), (f), (g), (h), and (i), respectively. We proposed these changes to simplify the regulations by reducing confusion and grouping identical TS requirements into a combined provision. We also proposed to insert the education algorithm at paragraph (c)(4)(i)(B).

At newly redesignated paragraph (e)(1)(ii), we proposed to remove the language at existing paragraph (k)(1)(ii)(B) since the American Society of Cytology has not provided certification for cytology since 1998; certification is provided by American Board of Pathology and American Board of Osteopathic Pathology.

At newly redesignated paragraph (d) (formerly paragraph (q)), we proposed amending the immunohematology requirement for the TS requirement to align with other TS qualifications and allow individuals with doctoral, master's, and bachelor's degrees with appropriate training and experience to qualify as a TS for immunohematology. This provision will be included in § 493.1449(d). The current regulation requires that the TS for immunohematology be a doctor of medicine or osteopathy. Fulfilling the CA requirements (for example, direct observation) can be challenging in rural facilities as the TS may not be onsite as the individual(s) may cover a large geographic area. Often a MT/CLS with a SBB (Specialist in Blood Bank) from ASCP (The American Society for Clinical Pathology) [23] is on-site to oversee the day-to-day operations of the blood bank. By allowing qualified individuals with doctoral, master's, or bachelor's degrees, to qualify as TSs, the personnel responsibilities will align with the current practices in laboratories without affecting the ability of the laboratory to provide accurate and reliable results. Further, the proposed change may help alleviate a shortage of physicians in rural areas and does not constitute a risk to public health or the individuals served by the laboratory.

As discussed in section III. B.16. of the proposed rule, we proposed at § 493.1449 to remove an earned doctoral, master's, or bachelor's degree in ''physical science'' as a means to qualify.

We received public comments on these proposals at § 493.1449. The following is a summary of the public comments we received and our responses.

Comment: One commenter opposed the proposal to include qualification pathways for master's and bachelor's degree candidates to qualify as TSs in laboratories that perform testing in the specialty of immunohematology. The commenter stated that the immunohematology field is evolving into emerging uses such as hazards of therapies (for example, cellular therapy) in transfusion medicine, which require the expertise of a physician to oversee. Another commenter stated that the high risk associated with a mistake in immunohematology could cost a patient their life. Another commenter suggested removing a master's or a bachelor's degree as an equivalency to individuals with an MD, DO, Doctor of Podiatric Medicine (DPM), or an earned Ph.D. in chemical, biological, or clinical laboratory science or medical technology in the subspecialty of bacteriology, mycobacteriology, mycology, parasitology, or virology as delineated in paragraph (c)(4), and the subspecialty of diagnostic immunology, chemistry, hematology, radiobioassay, or immunohematology, as delineated in paragraph (d)(4). The commenter stated that the breadth and depth of experience, training, critical thinking, and analytical skillset acquired from a master's or bachelor's degree, are considerably lower and notably less stringent than those obtained from a traditional doctoral degree and maintaining the current CLIA qualifications related to MD, DO, DPM, and doctoral degree would be consistent with the requirements for certification by all nine HHS-approved certification boards.

Response: The current CLIA regulations provide qualification pathways for master's and bachelor's degrees for the subspecialties of bacteriology, mycobacteriology, mycology, parasitology, and virology and the specialties of diagnostic immunology, chemistry, hematology, and radiobioassay. We proposed to amend the immunohematology requirement to align with other TS qualifications and allow individuals with doctoral, master's, and bachelor's degrees with appropriate training and experience to qualify as a TS for immunohematology. As noted in the proposed rule, fulfilling the CA requirements (for example, direct observation) can be challenging in rural facilities. A physician or doctoral-level TS may not be onsite as the individual(s) may cover a large geographic area. Allowing qualified individuals with doctoral, master's, or bachelor's degrees to qualify as TSs will align with the current practices in laboratories without affecting the ability of the laboratory to provide accurate and reliable results.

In this final rule, consistent with our proposed and final policy, we are also reformatting proposed § 493.1449(c)(3), (4), and (5) and § 493.1449(d)(3), (4), and (5) to clarify that individuals qualifying with a traditional doctoral, master's or bachelor's degree and those qualifying under the new educational pathway must all have the required years of laboratory training or experience. As we explained in the July 2022 proposed rule (87 FR 44911), the requirement for laboratory training and/or experience applies to all individuals qualifying through an educational pathway. We are also reformatting proposed § 493.1449(h) to clarify that there are two pathways to qualify under this subsection. Those pathways were designated (h)(1) and (h)(1)(i) in the proposed regulation text and are being finalized as (h)(1) and (2).

We are making technical changes in the finalized regulatory text to enhance consistency. Specialty/subspecialty headers were also added to the regulatory text to identify each of the specialty/subspecialty sections. CMS is also correcting and updating cross-references in the finalized regulatory text where necessary for consistency with the reformatting of the finalized regulations or to correct technical errors.

In this final rule, at § 493.1449(c)(4)(i)(C)(*2*) we are revising to clarify that, under this educational pathway, 16 semester hours in a combination of graduate level coursework in the specified subjects and a thesis or research project related to CLIA laboratory testing is required and that, if an individual is qualifying based on a thesis or research project, that thesis or research project must be approved, meaning the individual must have received credit for it as reflected on their transcript. CMS's policy is to verify educational qualifications by reviewing transcripts, as described in its Survey and Certification Memorandum 16–18–CLIA, *Personnel Policies for Individuals Directing or Performing Non-waived Tests* at 2–4 (April 1, 2016), available at *https://www.cms.gov/medicare/provider-enrollment-and-certification/surveycertificationgeninfo/policy-and-memos-to-states-and-regions-items/survey-and-cert-letter-16-18.*

We are adding ''laboratory'' where training is required at § 493.1449(i)(1) and (i)(2) in this final rule to clarify the type of acceptable training, consistent with the new definition of ''laboratory training or experience'' at 42 CFR 493.2 and related discussion in the July 2022 proposed rule that training and experience must be in a CLIA laboratory (87 FR 44911–44913).

As previously discussed in section III.B.7 of this final rule, we are also adding the grandfathering clause in the final regulatory text at § 493.1449(j). Like the other new grandfather clauses, this one allows individuals already qualified and employed as high complexity technical supervisors as of the effective date of the final rule to continue to be qualified under the new provisions provided the individuals remain continuously employed in their position after the effective date.

After consideration of the comments received, we are finalizing the proposed

[23] *https://www.ascp.org/content/docs/default-source/boc-pdfs/exam-content-outlines/ascp-boc-us-procedures-book-web.pdf.*

changes at § 493.1449, with the following modifications:

- To include medical laboratory science as discussed previously in sections III.B.1. (§ 493.2) and III.B.3. (§ 493.1405) of this final rule.
- To revise the regulatory text at § 493.1449(c)(4)(i)(C)(*2*) as described previously.
- To reformat § 493.1449(c)(3), (4), and (5), (d)(3), (4), and (5), and (h).
- To revise the regulatory cross-reference at § 493.1449(c)(3)(i)(B) to § 493.1443(b)(3)(i)(B) for consistency with the reformatting of the final regulations.
- To revise the regulatory cross-reference at § 493.1449(d)(3)(i)(B) to § 493.1443(b)(3)(i)(B) for consistency with the reformatting of the final regulations.
- To revise the regulatory cross-reference at § 493.1449(d)(4)(i)(B) to § 493.1449(c)(4)(i)(B) and § 493.1449(c)(4)(i)(C) for consistency with the reformatting of these final regulations.
- To revise the regulatory cross-reference at § 493.1449(d)(5)(i)(B) to § 493.1449(c)(5)(i)(B) for consistency with the reformatting of the final regulations.
- To revise the regulatory cross-reference at § 493.1449(e)(2) to paragraph (e)(1) for consistency with the final regulations.
- To revise the regulatory cross-reference at § 493.1449(f)(1)(ii) to paragraph (f)(1)(i)(B) for consistency with the final regulations.
- To revise the regulatory cross-reference at § 493.1449(f)(2)(ii) to paragraph (f)(2)(i)(B) for consistency with the final regulations.
- To revise the regulatory cross-reference at § 493.1449(f)(3)(ii) to paragraph (f)(3)(i)(B) to include both certification pathways in § 493.1449(f)(3)(i)(B).
- To revise the regulatory cross-reference at § 493.1449(g)(3) to paragraph (g)(1) for consistency with the final regulations.
- To revise the regulatory cross-reference at § 493.1449(h)(2)(i) to § 493.1443(b)(3)(i)(B) for consistency with the reformatting of the final regulations.
- To add ''laboratory'' where training is required at § 493.1449(i)(1) and (2).
- To add ''or'' to the revised regulatory text at § 493.1449(i)(2)(i), clinical cytogenetics, to clarify the two pathways under this regulation.
- To add specialty/subspecialty headers in the regulations at § 493.1449(c) through (i) to identify each of the specialty/subspecialty sections.
- To update the regulatory cross-reference of ''paragraph (h)'' at § 493.1449 in the regulatory text ''Note 1'' to ''paragraphs (b) through (i)'' because Note 1 applies to paragraphs (b) through (i), not just (h).
- To add the grandfathering clause to the final regulatory text at § 493.1449(j).

11. General Supervisor Qualifications (§ 493.1461)

As discussed in section III.B.17. of the proposed rule, we proposed at § 493.1461(c)(1)(i) to remove an earned doctoral, master's, or bachelor's degree in ''physical science'' as a means to qualify. At § 493.1461(c)(3) through (5), we proposed deleting the grandfather provisions as these requirements had to have been met by February 28, 1992, April 24, 1995, and September 1, 1992, respectively, and individuals can no longer qualify under these provisions. We stated that we plan to grandfather all individuals qualified under this provision. We also proposed adding new paragraph (c)(4) to specify a new grandfather provision for those individuals who had qualified prior to the publication of the final rule.

We received public comments on these proposals at § 493.1461. The following is a summary of the public comments we received and our responses.

Comment: A commenter stated that personnel qualifications do not recognize individuals with MLT or MT, and there is a need to ensure that individuals without associate degrees have pathways to qualify as a GS. The commenter noted the current CLIA exception allowing qualification by passing grade in a proficiency examination as indicated at 493.1461(c)(3)(ii).

Response: The current and proposed regulations for TP under § 493.1489 provide a pathway for individuals to qualify through education and training without possessing an earned associate degree. For example, if an individual is qualified as TP under § 493.1489(b)(3) as revised; and has at least 2 years of laboratory training or experience in high complexity testing, they will qualify as a GS.

In this final rule, we are also correcting and updating the regulatory cross-references in the current regulations at § 493.1461(e)(2) and (3) for consistency with the finalized regulations.

After consideration of the comments received, we are finalizing the proposed changes to § 493.1461(c) through (e), with the following modifications:

- To include medical laboratory science at § 493.1461(c)(1).
- To update the regulatory cross-reference at § 493.1461(e)(2) from ''§ 493.1449(l) or (2)'' to § 493.1449(f)(2).
- To update the regulatory cross-reference at § 493.1461(e)(3) from § 493.1449(l)(3) to § 493.1449(f)(3).

12. General Supervisor Qualifications on or Before February 28, 1992 (§ 493.1462)

At § 493.1462, we proposed removing the grandfather provision as this requirement must have been met by February 28, 1992. We stated that these individuals would be included in the new grandfather provision at § 493.1461(c)(4).

We received public comments on these proposals at § 493.1461(c)(4). The following is a summary of the public comments we received and our responses.

Comment: A commenter was concerned that the proposed changes to GS would affect current GSs who qualified under the § 493.1462 grandfather clause.

Response: We plan to grandfather individuals qualified under § 493.1462 under the new provision § 493.1461(c)(4). We are finalizing a new paragraph (c)(4) that will consider an individual qualified as a GS if they were qualified and serving as a GS in a CLIA-certified laboratory as of the effective date of the final rule and have done so continuously since the effective date of the final rule.

After consideration of the comments received, we are finalizing the removal of § 493.1462.

13. General Supervisor Responsibilities (§ 493.1463)

At § 493.1463(b)(4), we proposed revising the language stating the need to annually evaluate and document the performance of all testing personnel to now require the evaluation and documentation of the competency of all testing personnel. Historically, CLIA has allowed the TS to delegate all CA to the GS. However, the current regulations only speak to the ability of the GS to perform annual CA. We clarified that the LD or TS may delegate both the semi-annual and the annual CA.

We received public comments on these proposals at § 493.1463. The following is a summary of the public comments we received and our responses.

Comment: A commenter requested that the responsibilities specified in § 493.1463(b)(4) be further clarified to articulate that GSs in a laboratory that performs both high and moderate complexity testing are qualified to assess the competency of both high

complexity TP and moderate complexity TP. The commenter stated that the term ''all personnel'' in the rule is ambiguous because the GS is a position included in the personnel for laboratories performing high complexity testing and can oversee CA for high complexity TP. The commenter noted that moderate complexity testing could also be performed in a high complexity laboratory with a GS, and the GS should be able to perform CA on TP performing moderate complexity testing.

Response: The proposal under § 493.1463(b)(4) pertains to all TP, including those performing moderate complexity tests. This allows GSs in laboratories that perform both moderate and high complexity testing to perform the CA on both moderate and high complexity testing personnel. The CMS SOM, Appendix C will be updated.

After consideration of the comments received, we are finalizing the proposed changes to § 493.1463 without modification.

14. Cytotechnologist Qualifications (§ 493.1483)

At §§ 493.1483(b)(2) and 493.1489(b)(2)(ii)(B)(*1*), we proposed to replace ''CAHEA'' with CAAHEP (Commission on Accreditation of Allied Health Education Programs) and to remove, ''or other organization approved by HHS.'' In October 1992, the American Medical Association (AMA) announced its intent to support the establishment of a new and independent agency to assume the accreditation responsibilities of the Commission on Allied Health Education Accreditation (CAHEA), which is CAAHEP. HHS has no approval process for programs not approved or accredited by the Accrediting Bureau of Health Education Schools (ABHES) or CAAHEP.

At § 493.1483(b)(3) through (5), we proposed removing the grandfather provisions as these requirements had to have been met by September 1, 1992, or September 1, 1994, as individuals can no longer qualify under these provisions. We stated that we plan to grandfather all individuals qualified under this provision prior to the date of the final rule. These individuals would be included in the new grandfather provision at § 493.1483(b)(3).

We did not receive public comments on this provision, and are finalizing the proposed changes to § 493.1483. In this final rule, we are also correcting and updating the regulatory cross-reference in the introductory text of the current regulations at § 493.1483, from § 493.1449(k) to § 493.1449(e), for consistency with the finalized regulations.

15. Testing Personnel Qualifications (§ 493.1489)

We proposed removing paragraph (b)(3) as the February 28, 1992, grandfather provision must have been met by February 28, 1992. We also proposed redesignating paragraphs (b)(2)(i) and (ii) to paragraphs (b)(3)(i) and (ii), respectively. As noted, at § 493.1489(b)(3)(ii)(B)(*1*), we proposed replacing ''CAHEA'' with ''CAAHEP'' and removing ''or other organization approved by HHS.''

In addition, we proposed revising paragraph (b)(1) to separate the provisions into two paragraphs (that is, paragraph (b)(1) and new paragraph (b)(2)(i)). New paragraph (b)(1) would include the current requirement of a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located. New paragraph (b)(2)(i) would include an earned doctoral, master's, or bachelor's degree in a chemical, biological, or clinical laboratory science or medical technology from an accredited institution. As discussed in section III.B.17. of the proposed rule, we proposed removing an earned doctoral, master's, or bachelor's degree in ''physical science'' as a means to qualify. We proposed adding an earned doctoral, master's, or bachelor's degree in nursing as a means to qualify. In addition, we proposed adding new paragraph (b)(2)(ii) to state who may be qualified under § 493.1443(b)(3) or § 493.1449(c)(4) or (5) to allow individuals who do not have a chemical, biological, or clinical science or medical technology or clinical laboratory science degree to be eligible to qualify as a TC using the educational algorithm.

At § 493.1489(b)(4), we proposed amending this requirement by moving the military provision out of the April 24, 1995, grandfather provision and making it a mechanism that individuals will be able to qualify for moderate complexity testing (§ 493.1423(b)(3)). We believe these individuals have the requisite educational background to meet the requirements to perform laboratory testing under CLIA. In addition, we proposed removing paragraph (b)(4) introductory text and paragraph (b)(4)(i) [the text that currently states ''On or before'' through ''graduated from a [ML] or [CL] training program approved or accredited by ABHES, CAHEA, or other organizations approved by HHS''] per the discussion under § 493.1483(b)(2). As a result, the current military requirement at paragraph (b)(4)(ii) would be redesignated as paragraph (b)(4).

We received public comments on these proposals at § 493.1489. The following is a summary of the public comments we received and our responses.

Comment: Over 19,000 commenters provided a standardized ''form letter'' comment opposing the inclusion of nursing degrees (bachelor's and up) in the CLIA high complexity testing personnel requirements. In addition to the duplicate comments, we received many comments related to the inclusion of nursing degrees for high complexity testing personnel qualifications. The commenters stated that nursing degrees provide only a fraction of the academic science and little, if any, of the clinical training in non-waived laboratory testing that is required to qualify laboratory professionals. Bachelor's degrees in medical laboratory science, biology, and chemistry generally require at least 35–45 SH of academic science, with significant upper-level coursework. Commenters stated that in contrast, bachelor's degrees in nursing often require less than 14 SH in biology and/or chemistry, and usually only at the introductory level.

Response: After consideration of the public comments, we are not finalizing the proposed addition of a nursing degree in the revised § 493.1489(b)(2)(i) as a qualification for high complexity laboratory testing personnel. High complexity laboratory testing requires a higher level of knowledge; training and experience; troubleshooting and equipment maintenance skills; and interpretation and judgement than moderate complexity testing. Knowledge includes, but is not limited to, preanalytic, analytic and postanalytic phases of testing, calibration, quality control, and proficiency testing. We agree with the commenters that this knowledge and experience may not be obtained in the nursing curriculum despite its science course requirements. We believe that individuals with biological or chemical science degrees, clinical laboratory science, medical technology, and medical laboratory science have a better knowledge base for high complexity testing. Nurses who have the appropriate science courses and training may still qualify under § 493.1489(b)(2)(ii) and will be evaluated on a case-by-case basis. When performing an analysis of all the comments received, several additional themes emerged, including the lack of laboratory training that nursing professionals acquire, the additional burden that nurses would incur by

performing high complexity testing, the concern for patient safety, and the differences between POC testing (which is classified as waived or moderate complexity testing only) and high complexity testing. Beginning with the effective date of this final rule, individuals with nursing degrees will only be able to qualify for personnel positions listed in subpart M when a nursing degree is specifically listed in the regulatory qualifications. Nursing degrees will qualify under moderate complexity testing personnel. However, individuals with nursing degrees will no longer be able to qualify as high complexity testing personnel. All individuals, including those with nursing degrees, who are currently in positions listed in subpart M prior to the effective date of the final rule will be grandfathered as long as they meet the applicable grandfather provision, including the requirement for continuous employment in their position since the effective date of the final rule.

Comment: A commenter requested to revise § 493.1489 to add ''or'' at the end of paragraph (6)(i) to be consistent with similar proposed changes elsewhere in the proposed rule.

Response: We agree with the commenter and will amend § 493.1489(b)(6)(i).

In this final rule, we are also updating the regulatory cross-reference at § 493.1489(b)(7) for consistency with the finalized regulations.

After consideration of the comments received, we are finalizing the proposed changes to § 493.1489(b) with the following modifications:

- To include medical laboratory science at § 493.1489(b)(2)(i), consistent with similar changes as discussed elsewhere in this final rule, and to remove the proposed addition of a nursing degree at § 493.1489(b)(2)(i).
- To add ''or'' at the end of § 493.1489(b)(6)(i).
- To update the regulatory cross-reference at § 493.1489(b)(7) from § 493.1449(l) to § 493.1449(f) for consistency with the finalized regulations.

16. Technologist Qualifications on or Before February 28, 1992 (§ 493.1491)

We proposed removing § 493.1491 as individuals can no longer qualify under this provision.

We did not receive public comments on this provision and are finalizing the proposed change to remove § 493.1491. Individuals qualified under the previous § 493.1491(b)(6) are grandfathered by the new provision at § 493.1489(b)(5), provided they have been continuously employed in their positions since the effective date of this final rule.

17. Proposed Removal of Earned Degree in Physical Science as an Educational Requirement

At §§ 493.1405, 493.1411, 493.1423, 493.1443, 493.1449, 493.1461, and 493.1489, we proposed to remove ''physical science'' and add a new educational requirement for the ability to qualify based on SH. We concur with CLIAC's recommendation that a degree in physical science should be removed from the CLIA regulations as it is too broad and may not include relevant laboratory science coursework. It is a broad discipline often described as the study of nonliving systems, such as astronomy, physics, and earth sciences. Generally, these types of degrees are not related to clinical laboratory testing. Due to variation in usage and the absence of universally accepted definitions, a ''physical science degree'' is difficult to define for regulatory purposes. We stated that we believe that the proposed semester algorithm will allow individuals to qualify in the absence of a traditional chemical, biological, or clinical laboratory science or medical technology degree. An individual graduating with a physical science degree may or may not have sufficient course experience to meet the educational requirement, so the degree alone should not be listed among those that satisfy the educational requirement. We note that in some instances, individuals with these types of degrees have been able to qualify as high complexity TP under § 493.1489 and GSs under § 493.1461(b)(2) as long as they have the applicable training or experience (see section I.D.1.c. of the proposed rule).

We received public comments on these proposals. The following is a summary of the public comments we received and our responses.

Comment: Many commenters agreed with removing physical science as a qualifying degree, stating that it is not applicable to clinical laboratory work. A commenter noted that it takes years to become proficient in performing high complexity testing, such as identifying abnormal cells in blood, body fluids, and tissues, and disagreed with the removal of physical science as a qualifying degree.

Response: We agree that physical science coursework may not be applicable to clinical laboratory work, as discussed in the proposed rule. We also concur with CLIAC's recommendation that a degree in physical science should be removed from the CLIA regulations as it is too broad and may not include relevant laboratory science coursework. We have added an algorithm that may continue to allow individuals with physical science degrees to qualify provided they meet the requirements specified in the educational algorithm.

After consideration of the comments received, we are finalizing the proposed changes at §§ 493.1405, 493.1411, 493.1423, 493.1443, 493.1449, 493.1461, and 493.1489 to remove ''physical science.''

18. Clinical Laboratory Science and Medical Technology

At §§ 493.1405(b)(3) and (b)(5)(i), 493.1411(b)(4) and (6), 493.1443(b)(3)(i), and 493.1449(c)(3)(i), (c)(5)(i), (d)(3)(i), (d)(5)(i), (h)(2)(i), and (i)(2)(i), we proposed to remove any text referring to ''medical technology'' degrees and replace such text with references to degrees in ''clinical laboratory science and medical technology'' so that the latter phrase appears consistently throughout subpart M. Originally, degrees were given in medical technology; however, the naming convention for medical technology degrees has changed since the regulations were first published in the February 1992 final rule with comment period. We stated in the proposed rule that the degree is now referred to as clinical laboratory science and that a clinical laboratory science degree is synonymous with a medical technology degree.

We received public comments on these proposals. The following is a summary of the public comments we received and our responses.

Comment: Several commenters suggested the inclusion of medical laboratory science in addition to clinical laboratory science and medical technology throughout the personnel qualifications.

Response: We agree with the commenters and are amending applicable sections of subpart M to include both clinical and medical laboratory science, as discussed previously.

After consideration of the comments received, we are finalizing the proposed changes as indicated in sections III.B.1, 3, 6, 7, 8, 10, and 11 of this final rule. We are also amending applicable sections of subpart M in this final rule to include medical laboratory science.

19. Other Conforming Amendments

In preparing this final rule, we identified regulatory cross-references in certain existing regulations that will be outdated as a result of our proposed and final changes to the subpart M

regulations. Accordingly, in this final rule we are updating the regulatory cross-references at §§ 493.945(b)(2), (b)(3)(i), (b)(3)(ii)(C) and (F), 493.1273(b), 493.1274(c)(1), 493.1417(a), 493.1451(c), 493.1455(a), and 493.1469(a) to be consistent with the finalized regulations. Specifically, we are updating:

- the regulatory cross-reference at § 493.945(b)(2) from § 493.1449(k) to 493.1449(e).
- the regulatory cross-reference at § 493.945(b)(3)(i) from § 493.1449(k) to 493.1449(e).
- the regulatory cross-reference at § 493.945(b)(3)(ii)(C) from § 493.1449(k) to 493.1449(e).
- the regulatory cross-reference at § 493.945(b)(3)(ii)(F) from § 493.1449(k) to 493.1449(e).
- the regulatory cross-references at § 493.1273(b) from § 493.1449(l) to 493.1449(f) and from 493.1449(m) to 493.1449(g).
- the regulatory cross-reference at § 493.1274(c)(1)(i)(A) from § 493.1449(k) to 493.1449(e).
- the regulatory cross-reference at § 493.1417(a) from § 493.1405(b)(3)(i) to 493.1405(b)(3).
- the regulatory cross-reference at § 493.1451(c) from § 493.1449(k)(2) to 493.1449(e)(2).
- the regulatory cross-reference at § 493.1455(a) from §§ 493.1443(b)(3)(i) to 493.1443(b)(3) and from 493.1443(b)(6) to 493.1443(b)(5).
- the regulatory cross-reference at § 493.1469(a) from § 493.1449(k) to 493.1449(e).

C. Change to CLIA Requirements for Alternative Sanctions for CoW Laboratories Under § 493.1804(c)(1)

As discussed in section I.C. of the proposed rule, we proposed amending § 493.1804(c)(1) by removing the phrase ''(CMS does not impose alternative sanctions on laboratories that have certificates of waiver because those laboratories are not inspected for compliance with condition-level requirements.)''.

We received public comments on these proposals at § 493.1804(c)(1). The following is a summary of the public comments we received and our responses.

Comment: Several commenters supported the proposed amendment to allow alternative sanctions for CoW laboratories.

Response: We appreciate the commenters' support and are finalizing to remove the phrase ''Except for a condition level deficiency under § 493.41 or § 493.1100(a), CMS does not impose alternative sanctions on laboratories that have certificates of waiver because those laboratories are not routinely inspected for compliance with condition-level requirements.'' As previously discussed, the language ''Except for a condition level deficiency under § 493.41 or § 493.1100(a)'' was added in the Medicare and Medicaid Programs, Clinical Laboratory Improvement Amendments (CLIA), and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency interim final rule with comment period and was only effective during the PHE. Consistent with the finalized amendment to remove the current parenthetical § 493.1804(c), this language will also be deleted as of the effective date of this final rule.

After consideration of the comments received, we are finalizing the proposed amendment at § 493.1804(c)(1).

D. Delayed Effective Date for Certain Regulations Revised in This Final Rule

We recognize that time will be needed for laboratories, accreditation organizations, exempt States, and surveyors to implement the revised histocompatibility and personnel requirements. As such we are delaying the effective date of the revisions to the Histocompatibility (§ 493.1278) and Personnel (§§ 493.1359(b)(2), (c), and (d), 493.1405(b), 493.1406, 493.1407(c), 493.1411(b), 493.1423(b), 493.1443(b), 493.1445(c) and (e)(10), 493.1449, 493.1461(c) and (d)(3)(i), 493.1461(e), 493.1462, 493.1463(b)(4), 493.1483 introductory text and (b), 493.1489(b), and 493.1491)) regulations, the other related conforming amendments (§§ 493.945(b)(2), (b)(3)(i), and (b)(3)(ii)(C) and (F), 493.1273(b), 493.1274(c)(1)(i)(A), 493.1417(a), 493.1451(c), 493.1455(a), and 493.1469(a)), and the amendments to the Definitions (§ 493.2) for *continuing education (CE) credit hours, doctoral degree, experience directing or supervising, laboratory training or experience,* and *midlevel practitioner* until December 28, 2024. The delayed effective date reflects the timeframe that we believe the laboratories, accreditation organizations, exempt States, and surveyors will need to adopt and implement these revised regulations.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In the proposed rule, we solicited public comment on each of the section 3506(c)(2)(A) required issues for the following sections of this document that contain information collection requirements (ICRs).

A. CLIA Fees

This portion of the final rule does not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

B. Histocompatibility, Personnel, and Alternative Sanctions

1. Laboratory Costs To Update Policies and Procedures

We expect that the 33,747 CoC and CoA laboratories would incur costs for the time needed to review the revised personnel regulations and update their policies and procedures to be in compliance. The total one-time burden per laboratory to review and update affected policies and procedures is 5 to 7 hours (33,747 × 5 or 7). A management level employee (11–9111) would perform this task at an hourly wage of $57.61 per hour as published by the 2021 Bureau of Labor Statistics.[24] The wage rate would be $115.22 to include overhead and fringe benefits. The total cost would range from $19,441,647 to $27,218,305 (33,747 laboratories × 5- or 7-hours × $115.22).

Similarly, we expect that the 27,257 PPM laboratories would incur costs for the time needed to review and update the one change clarifying the requirement for CAs in PPM laboratories. We assume a one-time burden of 0.25 to 0.5 hours per

[24] *https://www.bls.gov/oes/tables.htm.*

laboratory for this task (27,257 × 0.25 or 0.5 hours). A management level employee (11–9111) would perform this task at an hourly wage of $57.61 per hour as published by the 2021 Bureau of Labor Statistics.[25] The wage rate would be $115.22 to include overhead and fringe benefits. The total cost would range from $785,138 to $1,570,276 (27,257 laboratories × 0.25- or 0.5-hours × $115.22).

The changes to the histocompatibility requirements affect approximately 247 laboratories that perform testing in this specialty. The laboratories may need to make additional changes to their policies and procedures for the histocompatibility updates. We assume a one-time cost of 1 to 2 hours per laboratory for this task (247 × 1 or 2). A management level employee (11–9111) would perform this task at an hourly wage of $57.61 per hour as published by the 2021 Bureau of Labor Statistics.[26] The wage rate would be $115.22 to include overhead and fringe benefits. The total cost would range from $28,459 to $56,919 (247 laboratories × 1- or 2-hours × $115.22).

Subsequent to the issuance of the July 2022 proposed rule (87 FR 44896), we published a 60-day notice in the **Federal Register** (88 FR 44132) to solicit public comments on the information collection requirements contained in this section. The revised information collection request was still under development when the proposed rule published. Upon publication of this final rule, the revised ICR will be submitted to OMB under OMB control number: 0938–0612, which expires January 31, 2024.

2. Accreditation Organization and Exempt State Costs To Update Policies and Procedures

Seven approved accrediting organizations and two exempt States have to review their policies and procedures, provide updates and submit the changes to CMS for approval (9 organizations/exempt States × 10 or 15 hours). We assume a one-time cost of 10 to 15 hours to identify the applicable legal obligations and to develop the policies and procedures needed to reflect the new requirements for personnel and histocompatibility. A management level employee (11–9111) would perform this task at an hourly wage of $57.61 per hour as published by the 2021 Bureau of Labor Statistics.[27] The wage rate would be $115.22 to include overhead and fringe benefits. The total cost would range from $10,370 to $15,555 (9 × 10- or 15 hours × $115.22).

Subsequent to the issuance of the July 2022 proposed rule (87 FR 44896), we published a 60-day notice in the **Federal Register** (88 FR 44132) to solicit public comments on the information collection requirements contained in this section. The revised information collection request was still under development when the proposed rule published. Upon publication of this final rule, the revised ICR will be submitted to OMB under OMB control number: 0938–0686, which expires January 31, 2024.

Table 11 reflects the total burden and associated costs for the provisions included in this final rule.

TABLE 11: Summary of All Costs for Collection of Information in this Final Rule

Information Collection Requests*	Burden Hours Increase/Decrease (+/-)*	Cost (+/-)*
A. Laboratory Costs to Update Policies and Procedures		
CoC/CoA	+7	$27,218,305
PPM	+0.5	$1,570,276
Histocompatibility	+2	$56,919
B. Accreditation Organization and Exempt State Costs to Update Policies and Procedures	+15	$15, 555
TOTAL	**+24.5**	**+28,861,055**

*All costs reflected in this table are one-time only costs. There are no ongoing costs.

V. Regulatory Impact Analysis

A. Statement of Need

1. CLIA Fees

As discussed in section I. of the proposed rule, when CLIA was enacted and its implementing regulations were finalized in 1992, CLIA fees were established based on estimates as to the average time a survey would take, cost of the surveyor salary per hour, as well as the size of the laboratory (schedules A, B, etc.). As discussed in section II. of the proposed rule, we proposed to increase certain CLIA fees, add new CLIA fees, and institute a biennial fee increase based on our analysis of the overall level of collections relative to the costs of maintaining the CLIA program, which project a shortfall beginning in calendar year 2025.

2. Histocompatibility, Personnel, Alternative Sanctions

This rule finalizes changes to update the CLIA regulations concerning histocompatibility (§ 493.1278), personnel (§§ 493.1351 through 493.1495), and alternative sanctions for laboratories operating under a CoW (§ 493.1804). With few exceptions, no changes have been made to the requirements listed previously in this final rule since the CLIA regulations were finalized in the February 1992 final rule with comment period (57 FR 7002). HHS assessed the need to update the sections addressed in this rule as many changes have occurred in the practice of laboratory medicine since that time, and other parts of the regulations have since been updated to eliminate redundancies and streamline requirements. We based our decision to update the regulations and incorporate the changes being finalized in this rule in part, upon advice from CLIAC (*www.cdc.gov/cliac/past-meetings.html*), a Federal advisory committee charged with providing recommendations to HHS on revisions needed to CLIA and from solicited public input via the 2018 RFI (83 FR 1004).

Because the specialty of histocompatibility is an evolving area of the clinical laboratory, several changes were made to update and clarify the histocompatibility requirements

[25] *https://www.bls.gov/oes/tables.htm.*

[26] *https://www.bls.gov/oes/tables.htm.*

[27] *https://www.bls.gov/oes/current/oes_nat.htm.*

finalized in the 2003 final rule (68 FR 3640). Since then, there have continued to be advancements in histocompatibility testing. As a result, some requirements have become obsolete and may preclude using current, improved methods and practices. As already mentioned, there have been updates to other parts of the CLIA regulations to eliminate redundancy with general quality system requirements. However, changes to eliminate redundancy have not previously been made in the histocompatibility specialty, which we believe would simplify and streamline the regulations. Thus, we are finalizing the elimination of redundant histocompatibility specialty regulations in this final rule.

Provisions to end a phase-in period, previously included in subpart M, that allowed individuals with an earned doctoral degree in a chemical, physical, biological, or clinical laboratory science to meet the qualification requirements for LDs of high complexity testing, prior to obtaining board certification, were finalized in the 2003 final rule. This rule also revised and expanded the qualifications required for such individuals to direct a laboratory performing high complexity testing. No other changes have been made to clarify or update subpart M since 1992, even though the top 10 laboratory deficiencies have historically continued to include qualification requirements and responsibilities for moderate and high complexity LDs (*https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/Downloads/CLIAtopten.pdf*). These high numbers of deficiencies may be due, in part, to the redundancy throughout subpart M or to requirements that are unclear, both of which may be an ongoing source of confusion for laboratories and individuals seeking to determine their qualification status. The number of deficiencies may also be due to laboratories whose directors are on-site infrequently or not at all.

The CLIA requirements at § 493.1804 describe general considerations for the imposition of sanctions under the CLIA program. This includes principal or alternative sanctions described in § 493.1804(c). This section specifies that alternative sanctions are not imposed on laboratories issued a CoW, but discretion is permitted in applying principal or alternative sanctions to laboratories issued other certificate types. Since the CLIA statute at 42 U.S.C. 263a(h) does not make this distinction with respect to alternative sanctions, we found that § 493.1804(c) can be updated to reflect CMS' belief that both alternative sanctions and principal sanctions should be an option in order to create parity for all certificate types. In some cases, we believe the imposition of principal sanctions on CoW laboratories is not appropriate and could create an undue burden on these laboratories for which, unlike laboratories with other certificate types, CMS cannot currently impose alternative sanctions, if appropriate.

In summary, we based our decision to update our regulations at § 493.1278 related to histocompatibility on changes in practice, advice from CLIAC, and responses to the 2018 RFI. We based our decision to update this rule for the personnel requirements in subpart M §§ 493.1351 through 493.1495 on advice from CLIAC, common questions we have received, and responses to the 2018 RFI. This final rule clarifies this subpart by deleting obsolete and redundant regulations and specifying personnel qualifications and responsibilities. We based our decision to update our regulation at § 493.1804(c) to allow for alternative sanctions to be imposed on CoW laboratories on responses received to the 2018 RFI.

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), Executive Order 14094 on Modernizing Regulatory Review (April 6, 2023), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 14094 amended section 3(f) of Executive Order 12866 to define a ''significant regulatory action'' as an action that is likely to result in a rule: (1) having an annual effect on the economy of $200 million or more in any 1 year, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with significant regulatory actions and/or with significant effects as per section 3(f)(1) of $200 million or more in any 1 year. Based on our estimates, OMB's Office of Information and Regulatory Affairs has determined this rulemaking is not significant per section 3(f)(1) as measured by the $200 million or more in any 1 year, since neither the low estimate of $20,894,051 nor the high estimate of $30,520,189 exceeds the $200 million annual threshold.

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small entities if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that the great majority of clinical laboratories and AOs are small entities, either by being nonprofit organizations or by meeting the Small Business Administration definition of a small business (having revenues of less than $8.0 million to $41.5 million in any 1 year). For purposes of the RFA, approximately 76 percent of clinical laboratories qualify as small entities based on their nonprofit status as reported in the American Hospital Association Fast Fact Sheet, updated January 2022 (*https://www.aha.org/statistics/fast-facts-us-hospitals),* and 100 percent of the AOs are nonprofit organizations as required in the CLIA regulations at § 493.551(a). Individuals and States are not included in the definition of a small entity. This percentage of small entities encompasses a substantial number of businesses and laboratories that will be affected by this final rule. However, we are unable to find relevant revenue data to compare the final rule's cost on a per small entity basis. AOs do not all provide the same services, PT modules, or analytes. Clinical laboratories provide different levels of testing, including referring some testing to outside laboratories. The changes regarding LDs may not affect laboratories that are already in compliance based on their prior policies, while other laboratories that do not have LDs on site will be impacted at different levels based on the

changes required to be in compliance with this final rule. The other changes being finalized will affect some laboratories more than others. Due to the inconsistency of the impact among all the laboratories and the lack of relevant data, we have provided a range of cost estimates as detailed below in the Anticipated Effects section (section C). As its measure of significant economic impact on a substantial number of small entities, HHS uses a change in revenue of more than 3 to 5 percent. We do not believe that this threshold will be reached by the requirements in this final rule, and it is anticipated that the benefits obtained by ensuring quality laboratory testing will outweigh the costs (see Tables 12 and 13). While a substantial number of clinical laboratories and AOs are affected by this rule, the impact is not economically significant. Therefore, the Secretary has certified that this final rule will not have a significant economic impact on a substantial number of small entities. We are voluntarily preparing a Regulatory Impact Analysis, including both a qualitative and quantitative analysis.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital located outside a metropolitan statistical area with fewer than 100 beds. There are approximately 654 small rural hospitals in the United States. Such hospitals often provide limited laboratory services or may refer all their testing to larger facilities. Although we are unable to estimate the number of laboratories that support small rural hospitals, we do not expect that the rule will have a significant impact on small rural hospitals. Therefore, the Secretary has certified that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2023, that threshold was approximately $177 million. We found that this final rule would not impose an unfunded mandate on States, Tribal governments, and the private sector of more than $177 million annually.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Two States have exempt status, which means we have determined that the State has enacted laws relating to the laboratory requirements that are equal to or more stringent than CLIA requirements, and the State licensure program has been approved by us. With implementation of the final rule, the two States, New York and Washington, would need to update their policies and procedures to maintain their exempt status but would otherwise not incur additional costs. Therefore, this final rule would not have a substantial direct effect on State or local governments, preempt States, or otherwise have a Federalism implication, and there is no change in the distribution of power and responsibilities among the various levels of government.

We did not receive any comments for the Overall Impact section in the proposed rule.

C. Anticipated Effects

Tables 12 and 13 reflect the estimated impact for the provisions included in this final rule.

TABLE 12: Summary of Estimated Impact for Histocompatibility and Personnel Regulations

Change	Low estimate	High estimate
Laboratories updating policies and procedures related to personnel and histocompatibility	$20,255,244	$28,845,500
Accrediting organizations and exempt States updating policies and procedures related to personnel, histocompatibility, and laboratory director site visit	$10,370	$15,555
Travel for site visits-Driving	$161,719	$727,500
Travel for site visits-Flying	$466,718	$931,634
Total Increased cost	$20,894,051	$30,520,189

TABLE 13: Summary of Estimated Impact for Fee Regulations

Change	Estimate
CLIA Fee Regulations	$24,371,183
Total Increased cost	$24,371,183

1. Fees

The final rule impacts approximately 298,791 CLIA certified laboratories. Certificate of Waiver (CoW) = 235,175; Certificate for Provider-performed Microscopy (PPM) Procedures = 29,717; Certificate of Registration (CoR) = 2,891; Certificate of Compliance (CoC) = 17,694; Certificate of Accreditation (CoA) = 15,935. (Data from Casper 85s 02/07/2022)

a. Two-Part Biennial Survey Fees

(1) CoC Laboratories Compliance Survey Fees

Table 14 reflects the national average of compliance fees for each classification of laboratories (schedules)

that requires inspection. Specifically, Table 14 represents the national average for each schedule for the current Compliance Survey Fees (noted with a ''c'') as paid biennially by laboratories that hold a CoC and the national average for each schedule for the new Compliance Survey Fees (noted with a ''n'') that will be paid after the first biennial two-part fee increase of 4.9598 percent along with an across-the-board increase of 18 percent by laboratories that hold a CoC. As discussed in section II. of this final rule, Table 14 shows estimated increases for CoC laboratories subject to the biennial fee increase.

TABLE 14: Two-part Fee for CoC Survey Fees*

Laboratory classification (schedules)	Current average (c)	New average (n) ATB and Biennial Increase= 18% *4.96%	Number of Laboratories per schedule*	Number of Laboratories per schedule divided by 2**
V	$360	$446	6,794	3,397
A	$1,192	$1,477	3,853	1,926.5
B	$1,591	$1,970	143	71.5
C	$1,988	$2,463	1,945	972.5
D	$2,336	$2,894	186	93
E	$2,684	$3,325	1,521	760.5
F	$3,032	$3,755	822	411
G	$3,380	$4,187	520	260
H	$3,728	$4,618	1,771	885.5
I	$4,076	$5,049	204	102
J	$4,408	$5,459	205	102.5

*Number of CoC labs by laboratory classification (schedules) (Data from Certification and Survey Provider Enhanced Reporting (CASPER) 0086S CLIA Laboratories Schedule Counts) Includes CoR labs of application type CoC.

**The fees are biennial; therefore, approximately half the CoC laboratories are affected annually.

(2) CoA Laboratories Validation Survey Fees.

Table 15 shows the national average of the Validation Survey Fee for each schedule of accredited laboratory. Specifically, Table 15 represents the national average fees for each schedule for the current Validation Survey Fee (noted with a ''c'') as paid biennially by laboratories that hold a CoA and the national average for the new Validation Survey Fee (noted with an ''n'') that will be paid after the first biennial two-part fee increase of 4.9598 percent along with an across-the-board increase of 18 percent by laboratories that hold a CoA. As discussed in section II. of this final rule, Table 15 shows estimated increases for CoA laboratories subject to the biennial fee increase.

TABLE 15: Two-part fee for Certificate of Accreditation (CoA) Validation Survey Fees*

Laboratory classification (schedules)	Current average (c)	New average (n) ATB and Biennial Increase= 18% *4.96%	Number of laboratories per schedule*	Number of Laboratories per schedule divided by 2**
V	$18	$22	2,174	1,087
A	$60	$74	2,538	1,269
B	$80	$98	129	64.5
C	$99	$123	1,771	885.5
D	$117	$145	175	87.5
E	$134	$166	1,577	788.5
F	$152	$188	876	438
G	$169	$209	5802	291
H	$186	$231	3,077	1,538.5
I	$204	$252	1,123	561.5
J	$220	$273	1,913	956.5

*Number of CoA labs by laboratory classification (schedules) (Data from CASPER 0086S CLIA Laboratories Schedule Counts dated 10/01/2019-09/30/2021) Includes CoR labs of application type CoA.

**The fees are biennial; therefore, approximately half the CoA laboratories are affected annually.

(3) Certificate of Waiver (CoW) Waived Test Categorization Certificate Fee

Table 16 shows the additional fee to be added to Certificates of Waiver (CoW) to offset program obligations to FDA for its role in the categorization of tests and test systems as waived. Specifically, Table 16 represents the certificate fee (noted with a ''c'') as paid biennially by laboratories that hold a CoW and the new certificate Fee (noted with an ''n'') that will be paid by laboratories that hold a CoW. As discussed in section II. of this final rule, Table 16 reflects a total increase of $25 as each laboratory's part of the Waived test categorization fee. This table also takes into account the first biennial two-part fee increase of 4.9598 percent along with an across-the-board increase of 18 percent.

TABLE 16: Certificate of Waiver (CoW) Waived Test Categorization Fee*

Type of CLIA certificate	Current Fee (c)	New Fee (n) based on $25 CoW increase with the ATB and Biennial Increase of 18% *4.96%
Certificate of Waiver (CoW)	$180	$248

*Total CoW lab estimate going into FY 2024 is 235,175/2 = 117,588. The fees are biennial; therefore, approximately half the CoW laboratories are affected annually.

(4) Two-part Biennial Certificate Fees

Table 17 shows the national average of the certificate fee for each schedule for the CoC and CoA laboratories and shows the CoW, PPM, and CoR certificate fees. Specifically, Table 17 represents the national average fees for each schedule for the CoC and CoA Certificate Fee and the CoW, PPM, and CoR (noted with a ''c'') as paid biennially by laboratories that hold a CoC, CoA, CoW, PPM, or CoR and the national average fees for each schedule for the new CoC and CoA Certificate Fee and the CoW, PPM, and CoR (noted with an ''n'') that will be paid after the first biennial two-part fee increase of 4.9598 percent with an 18 percent across the board increase by laboratories that hold a CoC, CoA, CoW, PPM, or CoR. As discussed in section II. of this final rule, Table 17 reflects estimated increases for all laboratory types subject to the biennial fee increase.

TABLE 17: Two-part Biennial Certificate Fee

Type of CLIA Certificate	Laboratory schedule	Current fee (c)	New average (n) ATB and Biennial Increase = 18% *4.96%	Number of laboratories*		Number of Laboratories divided by 2**	
Certificate of Waiver (CoW)	Not applicable	$180.00	$248.00 *	235,175		117,587.5	
Certificate for Provider-performed Microscopy (PPM) Procedures	Not applicable	$240.00	$297	29,717		14,858.5	
				CoC	CoA	CoC	CoA
Certificate of Compliance (CoC) and Certificate of Accreditation (CoA)	V	$180.00	$223	6,794	2,174	3,397	1,087
CoC and CoA	A	$180.00	$223	3,853	2,538	1,926.5	1,269
CoC and CoA	B	180.00	$223	143	129	71.5	64.5
CoC and CoA	C	$516.00	$639	1,945	1,771	972.5	885.5
CoC and CoA	D	$528.00	$654	186	175	93	87.5
CoC and CoA	E	$780.00	$966	1,521	1,577	760.5	788.5
CoC and CoA	F	$1,320.00	$1,635	822	876	411	438
CoC and CoA	G	$1,860.00	$2,304	520	582	260	291
CoC and CoA	H	$2,448.00	$3,032	1,771	3,077	885.5	1,538.5
CoC and CoA	I	$7,464.00	$9,244	204	1,123	102	561.5
CoC and CoA	J	$9,528.00	$11,801	205	1,913	102.5	956.5
Certificate of Registration (CoR)	Not applicable	$150	$184	2891		1,445.5	

*CoW $248 includes the 4.96% and 18% Increases +$25.
**Number of laboratories from CASPER 0086S CLIA Laboratories Schedule Counts.
***The fees are biennial; therefore, approximately half of the CoA laboratories are affected annually.

b. New Replacement and Revised Fees

Table 18 shows the cost of the replacement and revised certificate fees for each certificate type. These fees have not been charged prior to this rule.

TABLE 18: CLIA Replacement and Revised Certificates FY2019*

Certificate type	Number of Replacement Certificates issued in FY2019	Cost of Replacement Certificate	Number of Revised Certificates issued in FY2019	Cost of Revised Certificate
CoC	259	$75	515	$150
CoW	2,824	$75	6,985	$95
CoA	496	$75	505	$150
PPM	525	$75	984	$95
Total:	4104	$75	8989	$150

*Number of Replacement and Revised Certificates FY2019 (Data from CASPER 0104D CLIA 116 Activity report).

c. New Additional Fees

Table 19 shows the cost of the additional fees added by this final rule. These fees are only paid by laboratories with substantiated complaint surveys, unsuccessful performance of PT, or follow-up surveys for the determination of correction of deficiencies found on an original survey.

TABLE 19: New Additional Fees

Fees	Affected CLIA Certificate type(s)	Total Number of Affected Laboratories *	Hourly Cost	Occupation	Hours		Range of Cost Estimate for new fees per incident	
					Low	High	Low Estimate	High Estimate
Substantiated Complaints	All Laboratory types	56	$174.78 [1]	13-1041 43-1011 43-9199	5.00	184.75	$874	$32,291
Unsuccessful Proficiency Testing (PT)	Certificate of Compliance (CoC) laboratories	1,308	$174.78	13-1041 43-1011 43-9199	1.25	32.25	$218	$5,637
Follow-up Surveys[2]	Certificate of Compliance (CoC) & Certificate of Accreditation (CoA) laboratories	225	$174.78 2	13-1041 43-1011 43-9199	8.65	19.08	$1,512	$3,335
Total Estimated Cost							$2,604	$41,263

*Total number of affected laboratories is based on actual numbers from FY2019; Data from CASPER reporting system.
[1]$75.11 hourly rate includes $36.45 (13-1041: Compliance Officer) + $30.47 (43-1011: First-Line Supervisors of Office and Administrative Support Workers) + $20.47 (43-9199: Office and Administrative Support Workers, All Other). The wage rate would be doubled to $174.78 to include overhead and fringe benefits. Data from the Department of Labor *U.S. Bureau of Labor Statistics.*
[2]Includes Follow-up surveys on CoC and CoA laboratories and for Addition of Specialties.

2. Histocompatibility, Personnel, Alternative Sanctions

This final rule could impact all of the 319,487 CLIA-certified laboratories (accessed from the CMS Quality Improvement Evaluation System (QIES) database September 2022) to some extent. The changes to the personnel requirements will impact 33,747 CoC and CoA laboratories, as well as 27,257 PPM Certificate laboratories. The histocompatibility changes will impact 247 CoC and CoA laboratories certified for this specialty; and the allowance for alternative sanctions could impact 243,951 CoW laboratories only if they are found to be out of compliance with CLIA and subject to sanctions. The final rule will also impact the seven CLIA-approved AOs and two exempt States. Although complete data are not available to calculate all estimated costs and benefits that would result from the changes in this rule, we are providing an analysis of the potential impact based on available information and certain assumptions. Implementation of these requirements will result in changes that are anticipated to have both quantifiable and non-quantifiable impacts on laboratories, AOs, and exempt States, as specified previously in this final rule. In estimating the quantifiable impacts, we include costs to CoC, CoA, and PPM laboratories that will result from the need to update

policies and procedures. We also estimate costs for travel expenses that laboratories may incur to meet the requirement to have a LD on-site at least once every 6 months. For quantifiable impacts on AOs and exempt States, we estimate the costs for updating their policies and procedures to reflect the new requirements for personnel and histocompatibility.

a. Quantifiable Impacts

(1) Laboratory Costs To Update Policies and Procedures

We expect that the 33,747 CoC and CoA laboratories will incur costs for the time needed to review the revised personnel regulations and update their policies and procedures to be in compliance with them. We assume a one-time burden of 5 to 7 hours per laboratory to review and update affected policies and procedures, and we assume the person performing this task would be a management level employee paid $115.22 per hour (wages, salary and benefits; (*www.bls.gov/oes/tables.htm*)). Therefore, we estimate the one-time costs for CoC and CoA laboratories to update policies and procedures to comply with the revised personnel requirements will range from $19,441,647 to $27,218,305 (see Table 20).

Similarly, we expect that the 27,257 PPM laboratories will incur costs for the time needed to review and update the one change clarifying the requirement for CAs in PPM laboratories. We assume a one-time burden of 0.25 to 0.5 hours per laboratory for this task, also to be performed by a management level employee paid $115.22 per hour (wages, salary and benefits). Therefore, we estimate the one-time costs for PPM laboratories to update the single revised policy and procedure to comply with the personnel requirements will range from $785,138 to $1,570,276 (see Table 20).

The changes to the histocompatibility requirements when this rule is implemented will affect approximately 247 laboratories that perform testing in this specialty (QIES database December 16, 2022). While these laboratories are included in the calculations discussed previously in this final rule, they may need to make additional changes to their policies and procedures for the histocompatibility updates. We assume a one-time burden of one to two hours per laboratory for this task, as described previously in this final rule. Therefore, the laboratory costs for updating policies and procedures related to histocompatibility will range from $28,459 to $56,919 (see Table 20).

(2) Accreditation Organization and Exempt State Costs To Update Policies and Procedures

As a result of this final rule, seven approved accrediting organizations and two exempt States will have to review their policies and procedures, provide updates and submit the changes to us for approval. We estimate a one-time burden of 10 to 15 hours to identify the applicable legal obligations and to develop the policies and procedures needed to reflect the new requirements for personnel and histocompatibility. We assume the person performing this review will be a management level employee paid $115.22 per hour (wages, salary and benefits). Therefore, we estimate the costs for accrediting organizations and exempt States to update their policies and procedures will range from $10,370 to $15,555 (see Table 20).

TABLE 20: Estimated Costs to Update Policies and Procedures

Regulation Change	Affected Group	Total Number of Affected Groups	Hourly Cost	Hours		Range of Cost Estimate for Personnel and Histocompatibility Changes	
				Low	High	Low Estimate	High Estimate
Personnel	CoC & CoA Laboratories	33,747	$115.22	5	7	$19,441,647	$27,218,305
	PPM Laboratories	27,257	$115.22	0.25	0.50	$785,138	$1,570,276
Histocompatibility	CoC & CoA Laboratories	247	$115.22	1	2	$28,459	$56,919
Personnel, Histocompatibility	Accrediting Organizations and Exempt States	9	$115.22	10	15	$10,370	$15,555
Total Increased Cost						$20,265,614	$28,861,055

(3) Laboratory Costs for On-Site Laboratory Director Requirement

Estimating the potential travel costs for LDs to meet the on-site requirement is complex, due to wide variation in the numbers of individuals who might incur travel costs, variation in the distances traveled and modes of transportation used, and variation among already existing State and accreditation requirements for LDs to be on-site at some frequency. In addition, we had limited available data on which to base our assumptions. Therefore, we used a conservative approach in calculating our estimates and believe the estimates described below may be higher than actual costs that will be incurred.

In general, 10 States, one territory, and three out of seven AOs currently have some requirement for on-site visits by LDs, although the required frequencies vary. Ten States, including the exempt State of New York, plus the territory of Puerto Rico currently have requirements that are as stringent or more stringent than the provision that requires a LD to be on-site at least once every 6 months. Therefore, we have not counted CoC laboratories in these 10 States or in Puerto Rico among those that would be impacted by the

requirement for on-site LD visits. One accrediting organization American Association of Blood and Biotherapies (AABB) now requires on-site LD visits at least once a quarter. However, AABB only accredits 226 laboratories, or approximately 1.5 percent, of all accredited laboratories (QIES database, September 2022). Some of these laboratories are part of a hospital or other health care system that has laboratory specialties accredited for CLIA purposes by one or more of the other accrediting organizations, and therefore, will be impacted by the requirement for on-site LD visits. Since we do not have data to determine the number of such laboratories that are only accredited by AABB and already are meeting this requirement, and the number is likely to be relatively small, we are not adjusting the number of impacted laboratories based on AABB accreditation.

In the 40 States, four territories, and the District of Columbia, where the LD is not required to be on-site at least twice per year, 25,867 CoC and CoA laboratories (QIES, December 16, 2022) may not currently meet this requirement and may incur travel costs to comply with it. We have not adjusted this number where the provision was partially met, since no frequency was specified for CoC laboratories in three additional States, CoA laboratories under two additional accrediting organizations, or laboratories in the exempt State of Washington.

We assume that in most instances, the LD is on-site daily or more frequently than twice per year. Based on a review of State and AO information, discussed earlier in the preamble for this rule, we assume that between 5 percent (1,293) and 20 percent (5,173) of the CoC and CoA laboratories would need their LDs to travel twice a year to meet this requirement. For our estimate, we assumed this travel would include a combination of two modes of transportation, driving and flying. For the low estimate, we assumed that 1 percent of the 25,867 laboratories, or 259, would compensate their directors for flights while 4 percent, or 1,035 laboratories, would compensate them for their mileage to drive. For the high estimate, we assumed that, at most, 2 percent of the 25,867 laboratories, or 517, would compensate their LD for flying and that 18 percent, or 4,656 laboratories, would compensate for driving.

- *Driving:* We believe most LDs would drive fewer than 250 miles round trip to reach the laboratories they direct. We assume these LDs would drive to the location, conduct business, and return home the same day. We base our calculations for driving on the maximum estimated distance of 250 miles at $0.625 cents per mile (government travel reimbursement rates for mileage (*https://www.gsa.gov/travel-resources*)) for a maximum cost of $156.25 per trip. This may be an over-estimate since we believe not all the individuals who drive would travel 250 miles round trip. Based on the low estimate of 1,035 laboratories incurring costs for driving and our high estimate of 4,656 laboratories incurring costs for driving, our calculated cost for driving is estimated to range from $161,719 to $727,500 (see Table 21).
- *Flying:* Our estimates for the cost of flying assume that in these cases, travel to a remote site will be necessary. We believe basing it on travel to a remote site will over-estimate the cost since in many locations, although the LD may fly to reach their destination, they would not travel to remote locations and the travel costs would be less. However, we do not know the specific circumstances for which flying would be required. We estimated the maximum airfare for this travel to be $1500 and lodging costs to average $151.00 per night (based on the average of 100 hotel rates throughout the U.S. for 2020) (*https://ik.imgkit.net/3vlqs5axxjf/BTN/uploadedfiles/9_Microsites/Corporate_Travel_Index/CTI_2021/US_Diem/3-4_USHotelDetail.pdf*). We assumed lodging for two nights would be needed. Therefore, the total estimated cost for one trip would be $1,500 flight + $302.00 lodging or $1,802.00 per trip. Based on the low estimate of 259 laboratories incurring costs for remote travel and our high estimate of 517 laboratories incurring costs for remote travel, the range for laboratory costs for flying to on-site visits would be between $466,718 and $931,634 (see Table 21). Based on these assumptions for both driving and flying, we estimate the total cost for laboratories to compensate travel for the LD ranges from $628,437 to $1,659,134.

TABLE 21: Estimated Travel Costs to Meet On-site Laboratory Director Requirement

Regulation Change	Affected Group	Total Number of Affected Group		Airfare Cost ($1,500)	Hotel Cost ($151/2 nights)	Driving Cost ($0.625/mile*250 miles)	Total Impact for Personnel and Histocompatibility Regulation Changes	
On-Site Laboratory Director	CoA and CoC Laboratories	Low Estimate	High Estimate				Low estimate	High estimate
	Driving	1,035 (4%)	4,656 (18%)	NA	NA	$156.25	$161,719	$727,500
	Flying	259 (1%)	517 (2%)	$1,500	$302	N/A	$466,718	$931,634
Total Increased Cost							$628,437	$1,659,134

TABLE 22: Estimated Impact for Histocompatibility and Personnel Regulations

Change	Low estimate	High estimate
Laboratories updating policies and procedures related to personnel and histocompatibility*	$20,255,244	$28,845,500
Accrediting organizations and exempt States updating policies and procedures related to personnel, histocompatibility, and laboratory director site visit	$10,370	$15,555
Travel for site visits-Driving	$161,719	$727,500
Travel for site visits-Flying	$466,718	$931,634
Total Increased cost	$20,894,051	$30,520,189

* Low/high estimates represent the sum of estimates in Table 20 to update policies and Table 21 to estimate travel costs.

We did not receive any public comments on the discussion of the Anticipated Effects, Quantifiable Impacts, section in the proposed rule.

b. Results

We estimate that the overall impact of adding requirements for the changes in personnel, histocompatibility, and travel for LD on-site visits would range from $20,894,051 to $30,520,189 in the first year (see Table 22).

For each of the changes, Table 23 shows the projected range of cost estimates on an annual basis for 5 years starting in 2023. We assume costs for updating policies and procedures will be one-time costs that are only incurred in 2023. We assume the travel costs will be ongoing and will not change significantly over the 5-year period. The maximum cost estimate of approximately $30.5 million for the first year based on 2023 costs and approximately $1.7 million for subsequent years is not considered a significant economic impact. This final rule does not reach the economic threshold and thus is not considered a major rule.

TABLE 23: Five-Year Projection for Total Estimated Annual Costs for Personnel Regulations

Change	2023		2024		2025		2026		2027	
	Low	High	Low	High	Low	High	Low	High	Low	High
Policies and procedures-Laboratories*	$20,255,244	$28,845,500	$0	$0	$0	$0	$0	$0	$0	$0
Policies and procedures-Accrediting organizations and Exempt States	$10,370	$15,555	$0	$0	$0	$0	$0	$0	$0	$0
Travel-Driving	$161,719	$727,500	$161,719	$727,500	$161,719	$727,500	$161,719	$727,500	$161,719	$727,500
Travel-Flying	$466,718	$931,634	$466,718	$931,634	$466,718	$931,634	$466,718	$931,634	$466,718	$931,634
Total Increased cost	**$20,894,051**	**$30,520,189**	**$628,437**	**1,659,134**	**$628,437**	**1,659,134**	**$628,437**	**1,659,134**	**$628,437**	**1,659,134**

* Low/high estimates represent the sum of estimates in Table 20 to update policies and Table 21 to estimate travel costs.

We did not receive any comments for the Anticipated Effects, Result, section in the proposed rule.

c. Non-quantifiable Impacts and Benefit

(1) CLIA Fees

We stated in the proposed rule that CMS has limited knowledge of the non-quantifiable impacts and benefits and requested public comment on this topic.

We note that we did not receive any comments for the Anticipated Effects, Non-quantifiable Impacts and Benefit, CLIA Fees section in the proposed rule.

(2) Histocompatibility, Personnel, Alternative Sanctions

With implementation of this final rule for histocompatibility, personnel, and alternative sanctions several non-quantifiable impacts, most of which are considered benefits, will result for laboratories, accrediting organizations, and exempt States concerning changes in the requirements for personnel, histocompatibility, and alternative sanctions for CoW laboratories.

Many personnel changes in this rule will decrease the burden and provide greater flexibility for laboratories by increasing the number of eligible candidates for some personnel categories by expanding and clarifying the qualifying degrees. Examples of the provisions that will increase the number of qualified candidates for personnel categories include the addition of: clinical nurse specialists and certified registered nurse anesthetists in the definition of midlevel practitioners, a bachelor's degree in respiratory therapy as a possible qualifying degree as a TC and TP for moderate and high complexity blood gas testing, and an associate or bachelor of nursing degree as a qualifying degree for moderate complexity TP. Adding these options as qualifying degrees does not preclude the need for individuals to meet clinical laboratory training and experience requirements.

This rule will decrease burden, increase flexibility for laboratories, and streamline regulations by aligning the technical supervisor qualifications for laboratories performing immunohematology with those of other specialties such as hematology. Instead of limiting those qualified to serve as a technical supervisor in immunohematology to individuals with a doctor of medicine or doctor of osteopathy degree and appropriate certification and experience, individuals may also qualify with a doctoral, master's, or bachelor's degree in a chemical, biological, or clinical laboratory science or medical technology, or medical laboratory science and 1, 2, or 4 years applicable experience, respectively. These changes streamline the regulations and could increase a laboratory's ability to find qualified personnel, especially in rural areas. As it is not possible to predict the pathway a laboratory will use to qualify individuals when hiring personnel, we cannot quantify the impacts that would result with this rule.

Several other changes in this rule will impact laboratories and their personnel. However, we do not have data to quantify the impact. The qualification requirement for completing 20 CE credit hours, to cover LD responsibilities as defined in the regulations, prior to serving as an LD will apply to LDs for both moderate and high complexity testing except for those doctors of medicine, osteopathy, or podiatry who are certified by the American Board of Pathology, the American Osteopathic Board of Pathology, or other boards approved by HHS. Although there will be costs associated with obtaining these credits, currently employed LDs, at the effective date of the final rule, will not be required to obtain the 20 CE credit hours to retain their employment status. In the future, only one of several qualification routes for LDs will require the 20 CE credit hours. Accordingly, we cannot predict the number of laboratories that will choose to hire a LD through this qualification route. The impact of removing physical science degrees as qualifying degrees for any personnel categories is lessened because these individuals may still qualify if they have the required coursework and experience. In addition, laboratory personnel employed in their position on the effective date of the final rule, will continue to qualify under the applicable grandfather provision as long as they remain continuously employed in their positions.

The changes to the histocompatibility requirements in this rule will impact laboratories, accrediting organizations, and exempt States. It will streamline the histocompatibility requirements and remove those that are no longer relevant based on current testing practices, adding flexibility for laboratories and removing perceived barriers to current practices. It will remove specific, redundant requirements and replace them with those covered in general under §§ 493.1251, 493.1252, 493.1256, and 493.1445. This will simplify the requirements related to procedure manuals; test systems, equipment, instruments, reagents, materials, and supplies; control procedures; and LD responsibilities. We believe these impacts will decrease the burden and positively affect laboratories certified to perform testing in this specialty, as well as health care providers and patients.

Last, concerning the alternative sanctions provision, the final rule will allow us discretion in imposing alternative sanctions (that is, civil money penalties (CMP), directed plan of correction, directed portion of a plan of correction, and on-site State monitoring), rather than only being able to impose principal sanctions (that is, revocation, suspension, limitation of the CLIA certificate), in CoW laboratories, if appropriate. We believe this will increase flexibility, decrease potential burden while moving those laboratories toward compliance, and have no added economic impact on CoW laboratories. As previously described, this regulatory change could decrease the burden for sanctions imposed for improper proficiency testing referral. Although we have no data indicating that principal sanctions have been imposed on CoW laboratories for this reason in the past, if it occurred in the future, the ability to impose alternative sanctions, if appropriate, would be less punitive and potentially decrease any quantifiable economic impact. At this time, we cannot quantify what that impact would be.

We did not receive any comments for the Anticipated Effects, Non-quantifiable Impacts and Benefit, Histocompatibility, Personnel, Alternative Sanctions, section in the proposed rule.

D. Alternatives Considered

1. CLIA Fees

We considered multiple options prior to the proposed rule, including limiting across-the- board increase to varying percentages and timeframes required to achieve reasonable carryover targets for the CLIA program as a whole. We discussed multiple options in the December 31, 2018 notice with comment period (NC), including limiting the increase to varying percentages and timeframes across a single fee type, specifically Compliance Fees. When preparing the July 2022 proposed rule, we reviewed the alternatives in the NC to see if they were viable moving forward. The approach proposed was the best scenario for longevity for maintaining the fiscal solvency of the user-funded CLIA program. We have determined that 2 quarters worth of obligations were a reasonable carryover target based on program funding requirements and the time to accumulate and make available current year fee collections. We have also decided to build up to the carryover

target over a 3-year period to avoid either overcharging or undercharging. For example, we considered the following options:

- Setting various one-time dollar level fee increases for CoW laboratories.
- Setting various percentage increases for the one-time across-the-board increase.

Public comments received from the December 31, 2018 notice (83 FR 67723) with comment period (Medicare Program; Clinical Laboratory Improvement Amendments of 1988 (CLIA) Fees) [28] and 2022 proposed rule were considered during rulemaking.

We did not receive any comments for the Alternatives Considered, CLIA Fee section in the proposed rule.

2. Histocompatibility, Personnel, Alternative Sanctions

Several alternatives were considered in developing these changes to the histocompatibility, personnel, and alternative sanctions requirements under CLIA. In all cases, one option would be to leave the regulations as written. However, because many of the changes being finalized for histocompatibility and personnel resulted from public input via the 2018 RFI and recommendations made by CLIAC and will add flexibility, remove redundant or obsolete requirements, clarify and streamline the regulations, and decrease burden while maintaining laboratory quality, making these changes would be preferable. Also, the requirement to allow alternative sanctions to be imposed on CoW laboratories aligns the regulations with the CLIA statute; therefore, no other options were considered.

Regarding the histocompatibility requirements, we initially considered only removing the crossmatch regulatory requirement at § 493.1278(f)(2) which was perceived as a barrier to current practice with kidney transplantation. However, we decided to obtain input from interested parties to identify any concerns regarding crossmatching and other current regulatory requirement under the histocompatibility specialty. Our purpose for seeking input from interested parties through CLIAC and the 2018 RFI was to obtain information on whether the current histocompatibility requirements, including requirements for crossmatching, needed to be revised from when CLIA regulations were published in 1998 and 2003 to reflect the current practice. Our revision in this final rule reflects our attempt to address the input from interested parties and are intended to reflect the current practices as provided to CMS by interested parties through the 2018 RFI and CLIAC.

One of the personnel requirements in this rule is to require that LDs of moderate and high complexity testing, who are qualified through an educational pathway other than being a certified anatomic or clinical pathologist, have at least 20 CE credit hours related to their LD responsibilities. We considered requiring this of all LDs. However, since pathologists obtain this education as part of their education and training, it would be redundant and could increase costs to require this, although we do not have data to estimate what those costs would be since we do not know how many LDs would qualify using this pathway. We believe it is appropriate to finalize this requirement for other LD qualification routes. This information is critical for fulfilling LD responsibilities and is not always included in education and training for alternative qualification pathways.

Another LD requirement in this final rule is on-site visits to the laboratory at least once every 6 months, with at least a 4-month interval between on-site visits. We considered requiring these visits at a different frequency or not adding this requirement. However, surveyors reported that laboratories in which the director is not on-site tend to have more issues and citations when inspected, and 10 States, the territory of Puerto Rico, and one of the CLIA-approved AOs already require LD to be on-site at least once every 6 months. As a result, CLIAC recommended that LDs make and document at least two reasonably spaced on-site visits per year to supplement other interactions with staff and verify that the laboratory complies with laws and regulations. We agree with the CLIAC recommendation that two on-site visits per year is an appropriate frequency to achieve the intended improvement in laboratory compliance without adding a significant burden to laboratories. We will monitor this impact once the rule is finalized. Requiring these visits at a greater frequency and keeping all other factors the same would increase total projected costs per year. While requiring on-site visits only once per year would reduce estimated costs, it could delay the potential time it takes to identify laboratory issues that could ultimately result in patient harm. A third personnel requirement in this rule for which we considered various options is the expansion of the definition of midlevel practitioners to include certified registered anesthetists, and clinical nurse specialists as personnel qualified to serve as a LD or TP in PPM laboratories. Currently, this definition is limited to nurse midwives, nurse practitioners, or physician assistants, licensed by the State where the individual practices, if required in the State where the laboratory is located. We considered not expanding this definition or expanding it to include only one of the categories. However, certified registered anesthetists and clinical nurse specialists are both considered advanced practice registered nurses, as are certified nurse midwives and nurse practitioners. All four categories require at least a master's degree in nursing, and all may play a role in providing primary and preventive care services to the public. This may include performing the microscopic examinations required under PPM. As there is no expected cost-increasing impact of adding either of these nursing categories to the midlevel practitioner definition, and the change will increase flexibility and access to PPM testing, we are including it in the final rule.

We did not receive any comments for the Alternatives Considered, the Histocompatibility, Personnel, Alternative Sanctions section in the proposed rule.

E. Conclusion

1. CLIA Fees

Although the effect of the changes will increase laboratory costs, implementation of these changes would be negligible in terms of workload for laboratories as these fee increases are operational and technical in nature and do not require additional time to be spent by laboratory employees.

2. Histocompatibility, Personnel, Alternative Sanctions

We estimate that the cost to laboratories, accrediting organizations, and exempt States to comply with the changes in the final rule would range between $20,894,051 and $30,520,189 in 2023 dollars for the first year and between $628,437 and $1,659,134 in subsequent years. Although the requirements will increase laboratory costs, the implementation of the final rule will streamline and simplify regulations, add flexibility in laboratory hiring practices, ensure that the LD is on-site at least twice per year, and align histocompatibility testing with current methods and practices. This final rule will also allow alternative sanctions to be imposed on CoW laboratories.

[28] 83 FR 67723, December 31, 2018 (*https://www.govinfo.gov/content/pkg/FR-2018-12-31/pdf/2018-28359.pdf*).

We have determined that this rule will not have a significant economic impact on a substantial number of small entities or a significant impact in the operations of a substantial number of small rural hospitals. For these reasons, we are not preparing analyses for either the RFA or section 1102(b) of the Act.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on November 11, 2023.

Mandy K. Cohen, MD, MPH, Director of the Centers for Disease Control and Prevention, approved this document on November 11, 2023.

List of Subjects in 42 CFR Part 493

Administrative practice and procedure, Grant programs-health, Health facilities, Laboratories, Medicaid, Medicare, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR part 493 as set forth below:

PART 493—LABORATORY REQUIREMENTS

■ 1. Effective January 27, 2024, the authority citation for part 493 is revised to read as follows:

Authority: 42 U.S.C. 263a, 1302, 1395x(e), 1395x(s)(3) and (s)(17).

■ 2. Effective January 27, 2024, amend § 493.2 by adding definitions for ''Replacement certificate'' and ''Revised certificate'' in alphabetical order to read as follows:

§ 493.2 Definitions.

* * * * *

Replacement certificate means an active CLIA certificate that is reissued with no changes made.

* * * * *

Revised certificate means an active CLIA certificate that is reissued with changes to one or more fields displayed on the certificate, such as the laboratory's name, address, laboratory director, or approved specialties/subspecialties. For purposes of this part, revised certificates do not include the issuance, renewal, change in certificate type, or reinstatement of a terminated certificate with a gap in service.

* * * * *

■ 3. Effective December 28, 2024, further amend § 493.2 by:

■ a. Adding definitions for ''Continuing education (CE) credit hours'', ''Doctoral degree'', ''Experience directing or supervising'', and ''Laboratory training or experience'' in alphabetical order; and

■ b. Revising the definition of ''Midlevel practitioner''.

The additions and revision read as follows:

§ 493.2 Definitions.

* * * * *

Continuing education (CE) credit hours means either continuing medical education (CME) or continuing education units (CEUs). The CE credit hours must cover the applicable laboratory director responsibilities and be obtained prior to qualifying as a laboratory director.

* * * * *

Doctoral degree means an earned post-baccalaureate degree with at least 3 years of graduate level study that includes research related to clinical laboratory testing or advanced study in clinical laboratory science, medical laboratory science, or medical technology. For purposes of this part, doctoral degrees do not include doctors of medicine (MD), doctors of osteopathy (DO), doctors of podiatric medicine (DPM), doctors of veterinary medicine (DVM) degrees, or honorary degrees.

* * * * *

Experience directing or supervising means that the director or supervisory experience must be obtained in a facility that meets the definition of a laboratory under this section and is not excepted under § 493.3(b).

* * * * *

Laboratory training or experience means that the training or experience must be obtained in a facility that meets the definition of a laboratory under this section and is not excepted under § 493.3(b).

Midlevel practitioner means a nurse midwife, nurse practitioner, nurse anesthetist, clinical nurse specialist, or physician assistant licensed by the State within which the individual practices, if such licensing is required in the State in which the laboratory is located.

* * * * *

§ 493.557 [Amended]

■ 4. Effective January 27, 2024, amend § 493.557 in paragraph (b)(4) by removing the reference ''§§ 493.645(a) and 493.646(b)'' and adding in its place the reference ''§§ 493.649(a) and 493.655(b)''.

§ 493.575 [Amended]

■ 5. Effective January 27, 2024, amend § 493.575 in paragraph (i) by removing the reference ''§§ 493.645(a) and 493.646(b)'' and adding in its place the reference ''§§ 493.649(a) and 493.655(b)''.

■ 6. Effective January 27, 2024, § 493.638 is revised to read as follows:

§ 493.638 Certificate fees.

(a) *Basic rule.* Laboratories must pay a fee that covers the costs incurred for the issuance, renewal, change in certificate type, or reinstatement of a terminated certificate with a gap in service, and other direct administrative costs, as applicable. The total of fees collected by HHS under the laboratory program must be sufficient to cover the general costs of administering the laboratory certification program under section 353 of the PHS Act.

(1) For registration certificates, the fee is a flat fee that includes the costs for issuing the certificates, collecting the fees, and evaluating whether the procedures, tests, or examinations listed on the application fall within the testing allowed for the requested certificate.

(2) For a certificate of waiver, the fee includes the costs for issuing the certificate; collecting the fees; evaluating whether the procedures, tests, or examinations listed on the application fall within the testing appropriate for the requested certificate; and determining whether a laboratory test meets the criteria for a waived test.

(3) For a certificate for PPM procedures, the fee includes the costs for issuing the certificate, collecting the fees; and evaluating whether the procedures, tests, or examinations listed on the application meet the criteria for inclusion in the subcategory of PPM procedures.

(4) For a certificate of accreditation, the fee includes the costs for issuing the certificate, collecting the fees, evaluating the programs of accrediting bodies, and evaluating whether the procedures, tests, or examinations listed on the application fall within the testing appropriate for the requested certificate.

(5) For a certificate of compliance, the fee includes the costs for issuing the certificates, collecting the fees, evaluating and monitoring proficiency testing programs, and evaluating whether the procedures, tests or examinations listed on the application fall within the testing appropriate for the requested certificate.

(b) *Fee amount.* (1) The certificate fee amount is set biennially by HHS. CMS will publish a notice in the **Federal Register** biennially with any adjustments to the fee amounts, including any adjustments due to inflation, in accordance with § 493.680. For certificates of waiver and certificates

of PPM, the certificate fee amount is based on the category of test complexity performed by the laboratory. For all other certificate types, the fee amount is based on the category of test complexity performed by the laboratory and schedules or ranges of annual laboratory test volume (excluding waived tests and tests performed for quality control, quality assurance, or proficiency testing purposes) and specialties tested, with the amounts of the fees in each schedule being a function of the costs for all aspects of general administration of CLIA as set forth in paragraph (c) of this section.

(2) Certificate fees are assessed and payable at least biennially.

(3) The amount of the fee payable by the laboratory is the amount listed in the most recent notice published in the **Federal Register** at the time the application, renewal, change in certificate type, or reinstatement is processed by HHS or its designee.

(4) After processing an application for an issuance, renewal, change in certificate type, or reinstatement of a terminated certificate with a gap in service, HHS or its designee notifies the laboratory of the applicable fee amount.

(c) *Classification of laboratories for purposes of determining the fee amount for certificate types other than certificates of waiver or certificates of PPM.* (1) For purposes of determining a laboratory's classification under this section, a test is a procedure or examination for a single analyte. (Tests performed for quality control, quality assessment, and proficiency testing are excluded from the laboratory's total annual volume.) Each profile (that is, group of tests) is counted as the number of separate procedures or examinations; for example, a chemistry profile consisting of 18 tests is counted as 18 separate procedures or tests.

(2) For purposes of determining a laboratory's classification under this section, the specialties and subspecialties of service for inclusion are:

(i) The specialty of Microbiology, which includes one or more of the following subspecialties:

(A) Bacteriology.

(B) Mycobacteriology.

(C) Mycology.

(D) Parasitology.

(E) Virology.

(ii) The specialty of Serology, which includes one or more of the following subspecialties:

(A) Syphilis Serology.

(B) General immunology.

(iii) The specialty of Chemistry, which includes one or more of the following subspecialties:

(A) Routine chemistry.

(B) Endocrinology.

(C) Toxicology.

(D) Urinalysis.

(iv) The specialty of Hematology.

(v) The specialty of Immunohematology, which includes one or more of the following subspecialties:

(A) ABO grouping and Rh typing.

(B) Unexpected antibody detection.

(C) Compatibility testing.

(D) Unexpected antibody identification.

(vi) The specialty of Pathology, which includes the following subspecialties:

(A) Cytology.

(B) Histopathology.

(C) Oral pathology.

(vii) The specialty of Radiobioassay.

(viii) The specialty of Histocompatibility.

(ix) The specialty of Clinical Cytogenetics.

(3) There are 11 schedules of laboratories for the purpose of determining the fee amount a laboratory is assessed. Each laboratory is placed into one of the 11 schedules in paragraphs (c)(3)(i) through (xi) of this section based on the laboratory's scope and volume of testing:

(i) *Schedule V.* The laboratory performs not more than 2,000 laboratory tests annually.

(ii) *Schedule A.* The laboratory performs tests in no more than three specialties of service with a total annual volume of more than 2,000 but not more than 10,000 laboratory tests.

(iii) *Schedule B.* The laboratory performs tests in at least four specialties of service with a total annual volume of not more than 10,000 laboratory tests.

(iv) *Schedule C.* The laboratory performs tests in no more three specialties of service with a total annual volume of more than 10,000 but not more than 25,000 laboratory tests.

(v) *Schedule D.* The laboratory performs tests in at least four specialties with a total annual volume of more than 10,000 but not more than 25,000 laboratory tests.

(vi) *Schedule E.* The laboratory performs more than 25,000 but not more than 50,000 laboratory tests annually.

(vii) *Schedule F.* The laboratory performs more than 50,000 but not more than 75,000 laboratory tests annually.

(viii) *Schedule G.* The laboratory performs more than 75,000 but not more than 100,000 laboratory tests annually.

(ix) *Schedule H.* The laboratory performs more than 100,000 but not more than 500,000 laboratory tests annually.

(x) *Schedule I.* The laboratory performs more than 500,000 but not more than 1,000,000 laboratory tests annually.

(xi) *Schedule J.* The laboratory performs more than 1,000,000 laboratory tests annually.

■ 7. Effective January 27, 2024, § 493.639 is revised to read as follows:

§ 493.639 Fees for revised and replacement certificates.

(a) If, after a laboratory is issued a certificate, it requests a revised certificate, the laboratory must pay a fee to cover the cost of issuing a revised certificate. The fee for a revised certificate is based on the cost to issue the revised certificate to the laboratory. The fee must be paid in full before the revised certificate will be issued.

(1) If laboratory services are added to a certificate of compliance, the laboratory must pay an additional fee if required under § 493.643(d)(2).

(2) [Reserved]

(b) If, after a laboratory is issued a certificate, it requests a replacement certificate, the laboratory must pay a fee to cover the cost of issuing a replacement certificate. The fee for a replacement certificate is based on the cost of issuing the replacement certificate to the laboratory. The fee must be paid in full before issuing the replacement certificate.

■ 8. Effective January 27, 2024, § 493.643 is revised to read as follows:

§ 493.643 Additional fees applicable to laboratories issued a certificate of compliance.

(a) *Fee requirement.* In addition to the fee required under § 493.638, a laboratory subject to routine inspections must pay a fee to cover the cost of determining program compliance. Laboratories issued a certificate for PPM procedures, certificate of waiver, or a certificate of accreditation are not subject to this fee for routine inspections.

(b) *Costs included in the fee.* Included in the fee for determining program compliance are costs for evaluating qualifications of laboratory personnel; monitoring laboratory proficiency testing; and conducting onsite inspections of laboratories including: documenting deficiencies, evaluating laboratories' plans to correct deficiencies, creating training programs, training surveyors, and necessary administrative costs.

(c) *Fee amount.* The amount of the fee for determining program compliance is set biennially by HHS.

(1) The fee is based on the category of test complexity and schedules or ranges of annual laboratory test volume and specialties tested, with the amounts of

the fees in each schedule being a function of the costs for all aspects of determining program compliance as set forth in § 493.638(c).

(2) The fee is assessed and payable biennially.

(3) The amount of the program compliance fee is the amount applicable to the laboratory listed in the most recent notice published in the **Federal Register** at the time that the fee is generated.

(d) *Additional fees.* (1) If a laboratory issued a certificate of compliance has been inspected and follow-up visits are necessary because of identified deficiencies, HHS assesses the laboratory a fee to cover the cost of these visits. The fee is based on the actual resources and time necessary to perform the follow-up visits. HHS revokes the laboratory's certificate of compliance for failure to pay the assessed fee.

(2) If, after a certificate of compliance is issued, a laboratory adds services and requests that its certificate be upgraded, the laboratory must pay an additional fee if, to determine compliance with additional requirements, it is necessary to conduct an inspection, evaluate personnel, or monitor proficiency testing performance. The additional fee is based on the actual resources and time necessary to perform the activities. HHS revokes the laboratory's certificate for failure to pay the compliance determination fee.

(3) If it is necessary to conduct a complaint investigation, impose sanctions, or conduct a hearing, HHS assesses the laboratory holding a certificate of compliance a fee to cover the cost of these activities. If a complaint investigation results in a complaint being unsubstantiated, or if an HHS adverse action is overturned at the conclusion of the administrative appeals process, the Government's costs of these activities are not imposed upon the laboratory. Costs for these activities are based on the actual resources and time necessary to perform the activities and are not assessed until after the laboratory concedes the existence of deficiencies or an ALJ rules in favor of HHS. HHS revokes the laboratory's certificate of compliance for failure to pay the assessed costs.

(4) Laboratories with a certificate of compliance must pay a fee if the laboratory fails to perform successfully in proficiency testing for one or more specialties, subspecialties, analytes, or tests specified in subpart I of this part, and it is necessary to conduct a desk review of the unsuccessful performance. The additional fee is based on the actual resources and time necessary to perform the desk review. HHS revokes the laboratory's certificate of compliance for failure to pay the assessed costs.

■ 9. Effective January 27, 2024, amend § 493.645 by:

■ a. Revising the section heading;

■ b. Removing paragraph (a);

■ c. Redesignating paragraphs (b) and (c) as paragraphs (a) and (b);

■ d. Revising newly redesignated paragraph (a); and

■ e. Adding a paragraph heading for newly redesignated paragraph (b).

The revisions and addition read as follows:

§ 493.645 Additional fees applicable to laboratories issued a certificate of accreditation, certificate of waiver, or certificate for PPM procedures.

(a) *Accredited laboratories.* (1) A laboratory that is issued a certificate of accreditation is assessed an additional fee to cover the cost of performing validation inspections described at § 493.563. All accredited laboratories share in the cost of these inspections. These costs are 5 percent of the same costs as those that are incurred when inspecting nonaccredited laboratories of the same schedule (or range) and are paid biennially by each accredited laboratory whether the accredited laboratory has a validation inspection or not. HHS revokes the laboratory's certificate of accreditation for failure to pay the fee.

(2) If a laboratory issued a certificate of accreditation has been inspected and follow-up visits are necessary because of identified deficiencies, HHS assesses the laboratory an additional fee to cover the cost of these visits. The fee is based on the actual resources and time necessary to perform the follow-up visits. HHS revokes the laboratory's certificate of accreditation for failure to pay the fee.

(b) *Complaint surveys.* * * *

§ 493.646 [Removed]

■ 10. Effective January 27, 2024, § 493.646 is removed.

■ 11. Effective January 27, 2024, § 493.649 is revised to read as follows:

§ 493.649 Additional fees applicable to approved State laboratory programs.

(a) *Approved State laboratory programs.* State laboratory programs approved by HHS are assessed a fee for the following:

(1) Costs of Federal inspections of laboratories in that State (that is, CLIA-exempt laboratories) to verify that standards are being enforced in an appropriate manner.

(2) Costs incurred for investigations of complaints against the State's CLIA-exempt laboratories if the complaint is substantiated.

(3) The State's pro rata share of general overhead to administer the laboratory certification program under section 353 of the PHS Act.

(b) [Reserved]

■ 12. Effective January 27, 2024, § 493.655 is added to subpart F to read as follows:

§ 493.655 Payment of fees.

(a) Except for laboratories covered by approved State laboratory programs, all laboratories are notified in writing by HHS or its designee of the appropriate fee(s) and instructions for submitting the fee(s), including the due date for payment and where to make payment. The appropriate certificate is not issued until the applicable fees have been paid.

(b) For approved State laboratory programs, HHS estimates the cost of conducting validation inspections as described at § 493.563 within the State on at least a biennial period. HHS or its designee notifies the State by mail of the appropriate fees, including the due date for payment and the address of the United States Department of Treasury designated commercial bank to which payment must be made. In addition, if complaint investigations are conducted in laboratories within these States and are substantiated, HHS bills the State(s) the costs of the complaint investigations.

■ 13. Effective January 27, 2024, § 493.680 is added to subpart F to read as follows:

§ 493.680 Methodology for determining the biennial fee increase.

(a) *General rule.* Except for fees assessed to State laboratory programs approved by HHS, the fee amounts described in this subpart are subject to a biennial increase based on a two-part calculation of the Consumer Price Index—Urban (CPI–U) inflation adjustment and, if applicable, an additional increase as follows:

(1) CMS calculates the inflation rate using the compounded CPI–U over 2 years and, provided that the calculated rate is greater than zero, applies an increase to all fee amounts equal to the calculated rate.

(2) If the total fee amounts, including any increase applied under paragraph (a)(1) of this section, do not match or exceed actual program obligations based on a review of the previous 2 years' obligations, CMS applies an additional across the board increase to each laboratory's fees by calculating the difference between the total fee amounts and actual program obligations.

(b) *Baseline.* Any increase applied under paragraph (a) of this section is incorporated into the baseline fee

amounts for any subsequent biennial increase.

(c) *Publication.* Any increase applied under paragraph (a) of this section, including the calculation thereof, will be published as a notice in the **Federal Register**.

■ 14. Effective December 28, 2024, amend § 493.945 by revising paragraphs (b)(2), (b)(3)(i), (b)(3)(ii)(C) introductory text, and (b)(3)(ii)(F) introductory text to read as follows:

§ 493.945 Cytology; gynecologic examinations.

* * * * *

(b) * * *

(2) An individual qualified as a technical supervisor under § 493.1449(b) or (e) who routinely interprets gynecologic slide preparations only after they have been examined by a cytotechnologist can either be tested using a test set that has been screened by a cytotechnologist in the same laboratory or using a test set that has not been screened. A technical supervisor who screens and interprets slide preparations that have not been previously examined must be tested using a test set that has not been previously screened.

(3) * * *

(i) Each slide set must contain 10 or 20 slides with point values established for each slide preparation based on the significance of the relationship of the interpretation of the slide to a clinical condition and whether the participant in the testing event is a cytotechnologist qualified under § 493.1469 or § 493.1483 or functioning as a technical supervisor in cytology qualified under § 493.1449(b) or (e) of this part.

(ii) * * *

(C) Criteria for scoring system for a 10-slide test set. (See table at paragraph (b)(3)(ii)(A) of this section for a description of the response categories.) For technical supervisors qualified under § 493.1449(b) or (e):

* * * * *

(F) Criteria for scoring system for a 20-slide test set. (See table at paragraph (b)(3)(ii)(A) of this section for a description of the response categories.) For technical supervisors qualified under § 493.1449(b) or (e):

* * * * *

■ 15. Effective December 28, 2024, amend § 493.1273 by revising paragraph (b) to read as follows:

§ 493.1273 Standard: Histopathology.

* * * * *

(b) The laboratory must retain stained slides, specimen blocks, and tissue remnants as specified in § 493.1105. The remnants of tissue specimens must be maintained in a manner that ensures proper preservation of the tissue specimens until the portions submitted for microscopic examination have been examined and a diagnosis made by an individual qualified under § 493.1449(b), (f), or (g).

* * * * *

■ 16. Effective December 28, 2024, amend § 493.1274 by revising paragraph (c)(1)(i)(A) to read as follows:

§ 493.1274 Standard: Cytology.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(A) A technical supervisor qualified under § 493.1449(b) or (e).

* * * * *

■ 17. Effective December 28, 2024, § 493.1278 is revised to read as follows:

§ 493.1278 Standard: Histocompatibility.

(a) *General.* The laboratory must meet the following requirements:

(1) Use a continuous monitoring system and alert system to monitor the storage temperature of specimens (donor and recipient) and reagents and notify laboratory personnel when temperature limits are exceeded.

(2) Establish and follow written policies and procedures for the storage and retention of specimens based on the specific type of specimen. All specimens must be easily retrievable. The laboratory must have an emergency plan for alternate storage.

(3) If the laboratory uses immunologic reagents to facilitate or enhance the isolation or identification of lymphocytes or lymphocyte subsets, the efficacy of the methods must be monitored with appropriate quality control procedures.

(4) Participate in at least one national or regional cell exchange program, if available, or develop an exchange system with another laboratory in order to validate interlaboratory reproducibility.

(b) *Human leukocyte antigen (HLA) typing.* The laboratory must do the following:

(1) Use HLA antigen terminology that conforms to the World Health Organization (WHO) Nomenclature Committee for Factors of the HLA System.

(2) Have available and follow written criteria for determining when antigen and allele typing are required.

(c) *Antibody screening and identification.* The laboratory must make a reasonable effort to have available monthly serum specimens for all potential transplant recipients for periodic antibody screening, identification, and crossmatch.

(d) *Crossmatching.* For each type of crossmatch that a laboratory performs, the laboratory must do the following, as applicable:

(1) Establish and follow written policies and procedures for performing a crossmatch.

(2) Have available and follow written criteria for the following:

(i) Defining donor and recipient HLA antigens, alleles, and antibodies to be tested;

(ii) Defining the criteria necessary to assess a recipient's alloantibody status;

(iii) Assessing recipient antibody presence or absence on an ongoing basis;

(iv) Typing the donor, to include those HLA antigens to which antibodies have been identified in the potential recipient, as applicable;

(v) Describing the circumstances in which pre- and post-transplant confirmation testing of donor and recipient specimens is required;

(vi) Making available all applicable donor and recipient test results to the transplant team;

(vii) Ensuring immunologic assessments are based on test results obtained from a test report from a CLIA-certified laboratory; and

(viii) Defining time limits between recipient testing and the performance of a crossmatch.

(3) The test report must specify the type of crossmatch performed.

(e) *Transplantation.* Laboratories performing histocompatibility testing for infusion and transplantation purposes must establish and follow written policies and procedures specifying the histocompatibility testing (that is, HLA typing, antibody screening and identification, and crossmatching) to be performed for each type of cell, tissue, or organ to be infused or transplanted. The laboratory's policies and procedures must include, as applicable—

(1) Testing protocols that address:

(i) Transplant type (organ, tissue, cell);

(ii) Donor (living, deceased, or paired): and

(iii) Recipient (high risk vs. unsensitized);

(2) Type and frequency of testing required to support clinical transplant protocols; and

(3) Process to obtain a recipient specimen, if possible, for crossmatch that is collected on the day of the transplant and prior to transplantation. If the laboratory is unable to obtain a recipient specimen on the day of the

transplant, the laboratory must have a process to document its efforts to obtain the specimen.

(f) *Documentation.* The laboratory must document all control procedures performed, as specified in this section.

■ 18. Effective December 28, 2024, amend § 493.1359 by revising paragraph (b)(2) and adding paragraphs (c) and (d) to read as follows:

§ 493.1359 Standard; PPM laboratory director responsibilities.

* * * * *

(b) * * *

(2) Is performed in accordance with applicable requirements in this subpart and subparts H, J, and K of this part;

(c) Evaluate the competency of all testing personnel and ensure that the staff maintains their competency to perform test procedures and report test results promptly, accurately, and proficiently. The procedures for evaluation of the competency of the staff must include, but are not limited to—

(1) Direct observations of routine patient test performance, including, if applicable, specimen handling, processing, and testing;

(2) Monitoring the recording and reporting of test results;

(3) Review of test results or worksheets;

(4) Assessment of test performance through testing internal blind testing samples or external proficiency testing samples; and

(5) Assessment of problem solving skills; and

(d) Evaluate and document the performance of individuals responsible for PPM testing at least semiannually during the first year the individual tests patient specimens. Thereafter, evaluations and documentation must be performed at least annually.

■ 19. Effective December 28, 2024, amend § 493.1405 by revising paragraph (b) to read as follows:

§ 493.1405 Standard; Laboratory director qualifications.

* * * * *

(b) The laboratory director must—

(1)(i) Be a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(ii) Be certified in anatomic or clinical pathology, or both, by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(2)(i) Be a doctor of medicine, doctor of osteopathy, or doctor of podiatric medicine licensed to practice medicine, osteopathy, or podiatry in the State in which the laboratory is located; and

(ii) Have had laboratory training or experience consisting of:

(A) At least 1 year directing or supervising nonwaived laboratory testing; and

(B) Have at least 20 CE credit hours in laboratory practice that cover the laboratory director responsibilities defined in § 493.1407; or

(3)(i)(A) Hold an earned doctoral degree in a chemical, biological, clinical or medical laboratory science or medical technology from an accredited institution; or

(B) Hold an earned doctoral degree; and

(*1*) Have at least 16 semester hours of doctoral level coursework in biology, chemistry, medical technology (MT), clinical laboratory science (CLS), or medical laboratory science (MLS); or

(*2*) An approved thesis or research project in biology/chemistry/MT/CLS/MLS related to laboratory testing for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings; and

(ii) Have at least 20 CE credit hours in laboratory practice that cover the laboratory director responsibilities defined in § 493.1407; and

(A) Be certified and continue to be certified by a board approved by HHS; and

(B) Have had at least 1 year of experience directing or supervising nonwaived laboratory testing; or

(4)(i)(A) Have earned a master's degree in a chemical, biological, clinical or medical laboratory science or medical technology from an accredited institution; or

(B)(*1*) Meet bachelor's degree equivalency; and

(2) Have at least 16 semester hours of additional graduate level coursework in biology, chemistry, medical technology, clinical or medical laboratory science; or

(C)(*1*) Meet bachelor's degree equivalency; and

(*2*) Have at least 16 semester hours in a combination of graduate level coursework in biology, chemistry, medical technology, clinical or medical laboratory science and an approved thesis or research project related to laboratory testing for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings; and

(ii) Have at least 1 year of laboratory training or experience, or both, in nonwaived testing; and

(iii) Have at least 1 year of supervisory laboratory experience in nonwaived testing; and

(iv) Have at least 20 CE credit hours in laboratory practice that cover the director responsibilities defined in § 493.1407; or

(5)(i)(A) Have earned a bachelor's degree in a chemical, biological, clinical or medical laboratory science or medical technology from an accredited institution; or

(B) At least 120 semester hours, or equivalent, from an accredited institution that, at a minimum, includes either—

(*1*) Forty-eight (48) semester hours of medical laboratory science or medical laboratory technology courses; or

(*2*) Forty-eight (48) semester hours of science courses that include—

(*i*) Twelve (12) semester hours of chemistry, which must include general chemistry and biochemistry or organic chemistry;

(*ii*) Twelve (12) semester hours of biology, which must include general biology and molecular biology, cell biology or genetics; and

(*iii*) Twenty-four (24) semester hours of chemistry, biology, or medical laboratory science or medical laboratory technology in any combination; and

(ii) Have at least 2 years of laboratory training or experience, or both, in nonwaived testing; and

(iii) Have at least 2 years of supervisory laboratory experience in nonwaived testing; and

(iv) Have at least 20 CE credit hours in laboratory practice that cover the director responsibilities defined in § 493.1407.

(6) Notwithstanding any other provision of this section, an individual is considered qualified as a laboratory director of moderate complexity testing under this section if they were qualified and serving as a laboratory director of moderate complexity testing in a CLIA-certified laboratory as of December 28, 2024, and have done so continuously since December 28, 2024.

§ 493.1406 [Removed]

■ 20. Effective December 28, 2024, § 493.1406 is removed.

■ 21. Effective December 28, 2024, amend § 493.1407 by revising paragraph (c) to read as follows:

§ 493.1407 Standard; Laboratory director responsibilities.

* * * * *

(c) The laboratory director must:

(1) Be onsite at least once every 6 months, with at least 4 months between the minimum two on-site visits. Laboratory directors may elect to be on-site more frequently and must continue to be accessible to the laboratory to provide telephone or electronic consultation as needed; and

(2) Provide documentation of these visits, including evidence of performing

activities that are part of the laboratory director responsibilities.

* * * * *

■ 22. Effective December 28, 2024, amend § 493.1411 by revising paragraph (b) to read as follows:

§ 493.1411 Standard; Technical consultant qualifications.

* * * * *

(b) The technical consultant must—

(1)(i) Be a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(ii) Be certified in anatomic or clinical pathology, or both, by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(2)(i) Be a doctor of medicine, doctor of osteopathy, or doctor of podiatric medicine licensed to practice medicine, osteopathy, or podiatry in the State in which the laboratory is located; and

(ii) Have at least 1 year of laboratory training or experience, or both, in nonwaived testing, in the designated specialty or subspecialty areas of service for which the technical consultant is responsible (for example, physicians certified either in hematology or hematology and medical oncology by the American Board of Internal Medicine are qualified to serve as the technical consultant in hematology); or

(3)(i)(A) Hold an earned doctoral or master's degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution; or

(B) Meet either requirements in § 493.1405(b)(3)(i)(B) or (b)(4)(i)(B) or (C); and

(ii) Have at least 1 year of laboratory training or experience, or both, in nonwaived testing, in the designated specialty or subspecialty areas of service for which the technical consultant is responsible; or

(4)(i)(A) Have earned a bachelor's degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution; or

(B) Meet § 493.1405(b)(5)(i)(B); and

(ii) Have at least 2 years of laboratory training or experience, or both, in nonwaived testing, in the designated specialty or subspecialty areas of service for which the technical consultant is responsible; or

(5)(i) Have earned an associate degree in medical laboratory technology, medical laboratory science, or clinical laboratory science; and

(ii) Have at least 4 years of laboratory training or experience, or both, in nonwaived testing, in the designated specialty or subspecialty areas of service for which the technical consultant is responsible.

(6) For blood gas analysis, the individual must—

(i) Be qualified under paragraph (b)(1), (2), (3), or (4) of this section; or

(ii)(A) Have earned a bachelor's degree in respiratory therapy or cardiovascular technology from an accredited institution; and

(B) Have at least 2 years of laboratory training or experience, or both, in blood gas analysis; or

(7) Notwithstanding any other provision of this section, an individual is considered qualified as a technical consultant under this section if they were qualified and serving as a technical consultant for moderate complexity testing in a CLIA-certified laboratory as of December 28, 2024, and have done so continuously since December 28, 2024.

Note 1 to paragraph (b): The technical consultant requirements for ''laboratory training or experience, or both'' in each specialty or subspecialty may be acquired concurrently in more than one of the specialties or subspecialties of service, excluding waived tests. For example, an individual who has a bachelor's degree in biology and additionally has documentation of 2 years of work experience performing tests of moderate complexity in all specialties and subspecialties of service, would be qualified as a technical consultant in a laboratory performing moderate complexity testing in all specialties and subspecialties of service.

■ 23. Effective December 28, 2024, amend § 493.1417 by revising paragraph (a) to read as follows:

§ 493.1417 Standard; Clinical consultant qualifications.

* * * * *

(a) Be qualified as a laboratory director under § 493.1405(b)(1), (2), or (3); or

* * * * *

■ 24. Effective December 28, 2024, amend § 493.1423 by revising paragraph (b) to read as follows:

§ 493.1423 Standard; Testing personnel qualifications.

* * * * *

(b) Meet one of the following requirements:

(1) Be a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; or

(2) Have earned a doctoral, master's, or bachelor's degree in a chemical, biological, clinical or medical laboratory science, or medical technology, or nursing from an accredited institution; or

(3) Meet the requirements in § 493.1405(b)(3)(i)(B), (b)(4)(i)(B) or (C), or (b)(5)(i)(B); or

(4) Have earned an associate degree in a chemical, biological, clinical or medical laboratory science, or medical laboratory technology or nursing from an accredited institution; or

(5) Be a high school graduate or equivalent and have successfully completed an official military medical laboratory procedures course of at least a duration of 50 weeks and have held the military enlisted occupational specialty of Medical Laboratory Specialist (Laboratory Technician); or

(6)(i) Have earned a high school diploma or equivalent; and

(ii) Have documentation of laboratory training appropriate for the testing performed prior to analyzing patient specimens. Such training must ensure that the individual has—

(A) The skills required for proper specimen collection, including patient preparation, if applicable, labeling, handling, preservation or fixation, processing or preparation, transportation, and storage of specimens;

(B) The skills required for implementing all standard laboratory procedures;

(C) The skills required for performing each test method and for proper instrument use;

(D) The skills required for performing preventive maintenance, troubleshooting, and calibration procedures related to each test performed;

(E) A working knowledge of reagent stability and storage;

(F) The skills required to implement the quality control policies and procedures of the laboratory;

(G) An awareness of the factors that influence test results; and

(H) The skills required to assess and verify the validity of patient test results through the evaluation of quality control sample values prior to reporting patient test results.

(7) For blood gas analysis, the individual must—

(i) Be qualified under paragraph (b)(1), (2), (3), or (4) of this section; or

(ii)(A) Have earned a bachelor's degree in respiratory therapy or cardiovascular technology from an accredited institution; and

(B) Have at least 1 year of laboratory training or experience, or both, in blood gas analysis; or

(iii)(A) Have earned an associate degree related to pulmonary function from an accredited institution; and

(B) Have at least 2 years of laboratory training or experience, or both, in blood gas analysis.

(8) Notwithstanding any other provision of this section, an individual is considered qualified as a testing personnel under this section if they were qualified and serving as a testing personnel for moderate complexity testing in a CLIA-certified laboratory as of December 28, 2024, and have done so continuously since December 28, 2024.

■ 25. Effective December 28, 2024, amend § 493.1443 by revising paragraph (b) to read as follows:

§ 493.1443 Standard: Laboratory director qualifications.

* * * * *

(b) The laboratory director must—

(1)(i) Be a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(ii) Be certified in anatomic or clinical pathology, or both, by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(2)(i) Be a doctor of medicine, a doctor of osteopathy, or doctor of podiatric medicine licensed to practice medicine, osteopathy, or podiatry in the State in which the laboratory is located; and

(ii) Have at least 2 years of experience directing or supervising high complexity testing; and

(iii) Have at least 20 CE credit hours in laboratory practice that cover the director responsibilities defined in § 493.1445; or

(3)(i)(A) Hold an earned doctoral degree in a chemical, biological, clinical or medical laboratory science or medical technology from an accredited institution; or

(B) Hold an earned doctoral degree; and

(*1*) Have at least 16 semester hours of doctoral level coursework in biology, chemistry, medical technology (MT), clinical laboratory science (CLS), or medical laboratory science (MLS); or

(*2*) An approved thesis or research project in biology/chemistry/MT/CLS/MLS related to laboratory testing for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings; and

(ii) Be certified and continue to be certified by a board approved by HHS; and

(iii) Have at least 2 years of:

(A) Laboratory training or experience, or both: and

(B) Laboratory experience directing or supervising high complexity testing; and

(iv) Have at least 20 CE credit hours in laboratory practice that cover the director responsibilities defined in § 493.1445; or

(4) Notwithstanding any other provision of this section, an individual is considered qualified as a laboratory director of high complexity testing under this section if they were qualified and serving as a laboratory director of high complexity testing in a CLIA-certified laboratory as of December 28, 2024, and have done so continuously since December 28, 2024.

(5) For the subspecialty of oral pathology, be certified by the American Board of Oral Pathology, American Board of Pathology, or the American Osteopathic Board of Pathology.

■ 26. Effective December 28, 2024, amend § 493.1445 by revising paragraphs (c) and (e)(10) to read as follows:

§ 493.1445 Standard; Laboratory director responsibilities.

* * * * *

(c) The laboratory director must:

(1) Be onsite at least once every 6 months, with at least 4 months between the minimum two on-site visits. Laboratory directors may elect to be on-site more frequently and must continue to be accessible to the laboratory to provide telephone or electronic consultation as needed; and

(2) Provide documentation of these visits, including evidence of performing activities that are part of the laboratory director responsibilities.

* * * * *

(e) * * *

(10) Ensure that a general supervisor provides on-site supervision of high complexity test performance by testing personnel qualified under § 493.1489(b)(5);

* * * * *

■ 27. Effective December 28, 2024, § 493.1449 is revised to read as follows:

§ 493.1449 Standard; Technical supervisor qualifications.

The laboratory must employ one or more individuals who are qualified by education and either training or experience to provide technical supervision for each of the specialties and subspecialties of service in which the laboratory performs high complexity tests or procedures. The director of a laboratory performing high complexity testing may function as the technical supervisor provided he or she meets the qualifications specified in this section.

(a) The technical supervisor must possess a current license issued by the State in which the laboratory is located, if such licensing is required; and

(b) The laboratory may perform anatomic and clinical laboratory procedures and tests in all specialties and subspecialties of services except histocompatibility and clinical cytogenetics services provided the individual functioning as the technical supervisor—

(1) Is a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(2) Is certified in both anatomic and clinical pathology by the American Board of Pathology or the American Osteopathic Board of Pathology.

(c) Bacteriology, Mycobacteriology, Mycology, Parasitology or Virology—If the requirements of paragraph (b) of this section are not met and the laboratory performs tests in the subspecialty of bacteriology, mycobacteriology, mycology, parasitology, or virology, the individual functioning as the technical supervisor must—

(1)(i) Be a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(ii) Be certified in clinical pathology by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(2)(i) Be a doctor of medicine, doctor of osteopathy, or doctor of podiatric medicine licensed to practice medicine, osteopathy, or podiatry in the State in which the laboratory is located; and

(ii) Have at least 1 year of laboratory training or experience, or both, in high complexity testing within the specialty of microbiology with a minimum of 6 months of experience in high complexity testing within the applicable microbiology subspecialty; or

(3)(i)(A) Have an earned doctoral degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution; or

(B) Meet the requirements in § 493.1443(b)(3)(i)(B); and

(ii) Have at least 1 year of laboratory training or experience, or both, in high complexity testing within the specialty of microbiology with a minimum of 6 months of experience in high complexity testing within the applicable subspecialty; or

(4)(i)(A) Have earned a master's degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution; or

(B)(*1*) Meet bachelor's degree equivalency; and

(*2*) Have at least 16 semester hours of additional graduate level coursework in chemical, biological, clinical or medical laboratory science, or medical technology; or

(C)(*1*) Meet bachelor's degree equivalency; and

(*2*) Have at least 16 semester hours in a combination of graduate level coursework in biology, chemistry, medical technology, or clinical or medical laboratory science and an approved thesis or research project related to laboratory testing for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings; and

(ii) Have at least 2 years of laboratory training or experience, or both, in high complexity testing within the specialty of microbiology with a minimum of 6 months of experience in high complexity testing within the applicable subspecialty; or

(5)(i)(A) Have earned a bachelor's degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution; or

(B) Have at least 120 semester hours, or equivalent, from an accredited institution that, at a minimum, includes either—

(*1*) Forty-eight (48) semester hours of medical laboratory technology courses; or

(*2*) Forty-eight (48) semester hours of science courses that include—

(*i*) Twelve (12) semester hours of chemistry, which must include general chemistry and biochemistry or organic chemistry;

(*ii*) Twelve (12) semester hours of biology, which must include general biology and molecular biology, cell biology or genetics; and

(*iii*) Twenty-four (24) semester hours of chemistry, biology, or medical laboratory science or technology in any combination; and

(ii) Have at least 4 years of laboratory training or experience, or both, in high complexity testing within the specialty of microbiology with a minimum of 6 months of experience in high complexity testing within the applicable subspecialty.

(d) Diagnostic Immunology, Chemistry, Hematology, Radiobioassay, or Immunohematology—If the requirements of paragraph (b) of this section are not met and the laboratory performs tests in the specialty of diagnostic immunology, chemistry, hematology, radiobioassay, or immunohematology, the individual functioning as the technical supervisor must—

(1)(i) Be a doctor of medicine or a doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(ii) Be certified in clinical pathology by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(2)(i) Be a doctor of medicine, doctor of osteopathy, or doctor of podiatric medicine licensed to practice medicine, osteopathy, or podiatry in the State in which the laboratory is located; and

(ii) Have at least 1 year of laboratory training or experience, or both, in high complexity testing for the applicable specialty; or

(3)(i)(A) Have an earned doctoral degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution; or

(B) Meet the education requirement at § 493.1443(b)(3)(i)(B); and

(ii) Have at least 1 year of laboratory training or experience, or both, in high complexity testing within the applicable specialty; or

(4)(i)(A) Have earned a master's degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution; or

(B) Meet the education requirement at paragraph (c)(4)(i)(B) or (C) of this section; and

(ii) Have at least 2 years of laboratory training or experience, or both, in high complexity testing for the applicable specialty; or

(5)(i)(A) Have earned a bachelor's degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution; or

(B) Meet the education requirement at paragraph (c)(5)(i)(B) of this section; and

(ii) Have at least 4 years of laboratory training or experience, or both, in high complexity testing for the applicable specialty.

(e) Cytology—If the requirements of paragraph (b) of this section are not met and the laboratory performs tests in the subspecialty of cytology, the individual functioning as the technical supervisor must—

(1)(i) Be a doctor of medicine or a doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(ii) Be certified in anatomic pathology by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(2) An individual qualified under paragraph (b) or (e)(1) of this section may delegate some of the cytology technical supervisor responsibilities to an individual who is in the final year of full-time training leading to certification specified in paragraph (b) or (e)(1)(ii) of this section provided the technical supervisor qualified under paragraph (b) or (e)(1) of this section remains ultimately responsible for ensuring that all of the responsibilities of the cytology technical supervisor are met.

(f) Histopathology—If the requirements of paragraph (b) of this section are not met and the laboratory performs tests in the subspecialty of histopathology, the individual functioning as the technical supervisor must—

(1) Meet one of the following requirements:

(i)(A) Be a doctor of medicine or a doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(B) Be certified in anatomic pathology by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(ii) An individual qualified under paragraph (b) of this section or this paragraph (f)(1) may delegate to an individual who is a resident in a training program leading to certification specified in paragraph (b) or (f)(1)(i)(B) of this section, the responsibility for examination and interpretation of histopathology specimens.

(2) For tests in dermatopathology, meet one of the following requirements:

(i)(A) Be a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(B) Meet one of the following requirements:

(*1*) Be certified in anatomic pathology by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(*2*) Be certified in dermatopathology by the American Board of Dermatology and the American Board of Pathology; or

(*3*) Be certified in dermatology by the American Board of Dermatology; or

(ii) An individual qualified under paragraph (b) or (f)(2)(i) of this section may delegate to an individual who is a resident in a training program leading to certification specified in paragraph (b) or (f)(2)(i)(B) of this section, the responsibility for examination and interpretation of dermatopathology specimens.

(3) For tests in ophthalmic pathology, meet one of the following requirements:

(i)(A) Be a doctor of medicine or doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(B) Must meet one of the following requirements:

(*1*) Be certified in anatomic pathology by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(*2*) Be certified by the American Board of Ophthalmology and have successfully completed at least 1 year of formal post-residency fellowship training in ophthalmic pathology; or

(ii) An individual qualified under paragraph (b) or (f)(3)(i) of this section may delegate to an individual who is a resident in a training program leading to certification specified in paragraph (b) or (f)(3)(i)(B) of this section, the responsibility for examination and interpretation of ophthalmic specimens; or

(g) Oral Pathology—If the requirements of paragraph (b) of this section are not met and the laboratory performs tests in the subspecialty of oral pathology, the individual functioning as the technical supervisor must meet one of the following requirements:

(1)(i) Be a doctor of medicine or a doctor of osteopathy licensed to practice medicine or osteopathy in the State in which the laboratory is located; and

(ii) Be certified in anatomic pathology by the American Board of Pathology or the American Osteopathic Board of Pathology; or

(2) Be certified in oral pathology by the American Board of Oral Pathology; or

(3) An individual qualified under paragraph (b) or (g)(1) or (2) of this section may delegate to an individual who is a resident in a training program leading to certification specified in paragraph (b) or (g)(1) or (2) of this section, the responsibility for examination and interpretation of oral pathology specimens.

(h) Histocompatibility—If the laboratory performs tests in the specialty of histocompatibility, the individual functioning as the technical supervisor must either—

(1)(i) Be a doctor of medicine, doctor of osteopathy, or doctor of podiatric medicine licensed to practice medicine, osteopathy, or podiatry in the State in which the laboratory is located; and

(ii) Have training or experience that meets one of the following requirements:

(A) Have 4 years of laboratory training or experience, or both, within the specialty of histocompatibility; or

(B)(*1*) Have 2 years of laboratory training or experience, or both, in the specialty of general immunology; and

(*2*) Have 2 years of laboratory training or experience, or both, in the specialty of histocompatibility; or

(2)(i) Have an earned doctoral degree in a biological, clinical or medical laboratory science, or medical technology from an accredited institution; or meet the education requirement at § 493.1443(b)(3)(i)(B); and

(ii) Have training or experience that meets one of the following requirements:

(A) Have 4 years of laboratory training or experience, or both, within the specialty of histocompatibility; or

(B)(*1*) Have 2 years of laboratory training or experience, or both, in the specialty of general immunology; and

(*2*) Have 2 years of laboratory training or experience, or both, in the specialty of histocompatibility.

(i) Clinical cytogenetics—If the laboratory performs tests in the specialty of clinical cytogenetics, the individual functioning as the technical supervisor must—

(1)(i) Be a doctor of medicine, doctor of osteopathy, or doctor of podiatric medicine licensed to practice medicine, osteopathy, or podiatry in the State in which the laboratory is located; and

(ii) Have 4 years of laboratory training or experience, or both, in genetics, 2 of which have been in clinical cytogenetics; or

(2)(i) Hold an earned doctoral degree in a biological science, including biochemistry, clinical or medical laboratory science, or medical technology from an accredited institution; or meet the education requirement at § 493.1443(b)(3)(i)(B); and

(ii) Have 4 years of laboratory training or experience, or both, in genetics, 2 of which have been in clinical cytogenetics.

(j) Notwithstanding any other provision of this section, an individual is considered qualified as a technical supervisor under this section if they were qualified and serving as a technical supervisor for high complexity testing in a CLIA-certified laboratory as of December 28, 2024, and have done so continuously since December 28, 2024.

Note 1 to paragraphs (b) through (i): The technical supervisor requirements for ''laboratory training or experience, or both'' in each specialty or subspecialty may be acquired concurrently in more than one of the specialties or subspecialties of service. For example, an individual, who has a doctoral degree in chemistry and additionally has documentation of 1 year of laboratory experience working concurrently in high complexity testing in the specialties of microbiology and chemistry and 6 months of that work experience included high complexity testing in bacteriology, mycology, and mycobacteriology, would qualify as the technical supervisor for the specialty of chemistry and the subspecialties of bacteriology, mycology, and mycobacteriology.

■ 28. Effective December 28, 2024, amend § 493.1451 by revising paragraph (c) introductory text to read as follows:

§ 493.1451 Standard: Technical supervisor responsibilities.

* * * * *

(c) In cytology, the technical supervisor or the individual qualified under § 493.1449(e)(2)—

* * * * *

■ 29. Effective December 28, 2024, amend § 493.1455 by revising paragraph (a) to read as follows:

§ 493.1455 Standard: Clinical consultant qualifications.

* * * * *

(a) Be qualified as a laboratory director under § 493.1443(b)(1), (2), or (3) or, for the subspecialty of oral pathology, § 493.1443(b)(5);

* * * * *

■ 30. Effective December 28, 2024, amend § 493.1461 by revising paragraphs (c), (d)(3)(i), and (e) to read as follows:

§ 493.1461 Standard: General supervisor qualifications.

* * * * *

(c) If the requirements of paragraph (b)(1) or (2) of this section are not met, the individual functioning as the general supervisor must—

(1)(i) Be a doctor of medicine, doctor of osteopathy, or doctor of podiatric medicine licensed to practice medicine, osteopathy, or podiatry in the State in which the laboratory is located or have earned a doctoral, master's, or bachelor's degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution; and

(ii) Have at least 1 year of laboratory training or experience, or both, in high complexity testing; or

(2)(i) Qualify as testing personnel under § 493.1489(b)(3); and

(ii) Have at least 2 years of laboratory training or experience, or both, in high complexity testing; or

(3) Meet the requirements at § 493.1443(b)(3) or § 493.1449(c)(4) or (5); or

(4) Notwithstanding any other provision of this section, an individual is considered qualified as a general supervisor under this section if they were qualified and serving as a general supervisor in a CLIA-certified laboratory as of December 28, 2024, and have done so continuously since December 28, 2024.

(d) * * *

(3)(i) Have earned an associate degree related to pulmonary function from an accredited institution; and

* * * * *

(e) * * *

(1) In histopathology, by an individual who is qualified as a technical supervisor under § 493.1449(b) or (f)(1);

(2) In dermatopathology, by an individual who is qualified as a technical supervisor under § 493.1449(b) or (f)(2);

(3) In ophthalmic pathology, by an individual who is qualified as a technical supervisor under § 493.1449(b) or (f)(3); and

(4) In oral pathology, by an individual who is qualified as a technical supervisor under § 493.1449(b) or (g).

§ 493.1462 [Removed]

■ 31. Effective December 28, 2024, § 493.1462 is removed.

■ 32. Effective December 28, 2024, amend § 493.1463 by revising paragraph (b)(4) to read as follows:

§ 493.1463 Standard: General supervisor responsibilities.

* * * * *

(b) * * *

(4) Evaluating and documenting the competency of all testing personnel.

* * * * *

■ 33. Effective December 28, 2024, amend § 493.1469 by revising paragraph (a) to read as follows:

§ 493.1469 Standard: Cytology general supervisor qualifications.

* * * * *

(a) Be qualified as a technical supervisor under § 493.1449(b) or (e); or

* * * * *

■ 34. Amend § 493.1483 by revising the introductory text and paragraph (b) to read as follows:

§ 493.1483 Standard: Cytotechnologist qualifications.

Each person examining cytology slide preparations must meet the qualifications of § 493.1449 (b) or (e), or—

* * * * *

(b) Meet one of the following requirements:

(1) Have graduated from a school of cytotechnology accredited by the Commission on Accreditation of Allied Health Education Programs (CAAHEP); or

(2) Be certified in cytotechnology by a certifying agency approved by HHS; or

(3) Notwithstanding any other provision of this section, an individual is considered qualified as a cytotechnologist under this section if they were qualified and serving as a cytotechnologist in a CLIA-certified laboratory as of [effective date of the final rule], and have done so continuously since December 28, 2024.

■ 35. Effective December 28, 2024, amend § 493.1489 by revising paragraph (b) to read as follows:

§ 493.1489 Standard; Testing personnel qualifications.

* * * * *

(b) Meet one of the following requirements:

(1) Be a doctor of medicine, doctor of osteopathy, or doctor of podiatric medicine licensed to practice medicine, osteopathy, or podiatry in the State in which the laboratory is located; or

(2)(i) Have earned a doctoral, master's, or bachelor's degree in a chemical, biological, clinical or medical laboratory science, or medical technology from an accredited institution;

(ii) Be qualified under the requirements of § 493.1443(b)(3) or § 493.1449(c)(4) or (5); or

(3)(i) Have earned an associate degree in a laboratory science or medical laboratory technology from an accredited institution or—

(ii) Have education and training equivalent to that specified in paragraph (b)(2)(i) of this section that includes—

(A) At least 60 semester hours, or equivalent, from an accredited institution that, at a minimum, includes either—

(*1*) Twenty-four (24) semester hours of medical laboratory technology courses; or

(*2*) Twenty-four (24) semester hours of science courses that include—

(*i*) Six (6) semester hours of chemistry;

(*ii*) Six (6) semester hours of biology; and

(*iii*) Twelve (12) semester hours of chemistry, biology, or medical laboratory technology in any combination; and

(B) Have laboratory training that includes:

(*1*) Completion of a clinical laboratory training program approved or accredited by the ABHES or the CAAHEP (this training may be included in the 60 semester hours listed in paragraph (b)(3)(ii)(A) of this section); or

(*2*) At least 3 months documented laboratory training in each specialty in which the individual performs high complexity testing; or

(4) Successful completion of an official U.S. military medical laboratory procedures training course of at least 50 weeks duration and having held the military enlisted occupational specialty of Medical Laboratory Specialist (Laboratory Technician); or

(5) Notwithstanding any other provision of this section, an individual is considered qualified as a high complexity testing personnel under this section if they were qualified and serving as a high complexity testing personnel in a CLIA-certified laboratory as of December 28, 2024, and have done so continuously since December 28, 2024.

(6) For blood gas analysis—

(i) Be qualified under paragraph (b)(1), (2), (3), (4), or (5) of this section; or

(ii) Have earned a bachelor's degree in respiratory therapy or cardiovascular technology from an accredited institution; or

(iii) Have earned an associate degree related to pulmonary function from an accredited institution.

(7) For histopathology, meet the qualifications of § 493.1449(b) or (f) to perform tissue examinations.

§ 493.1491 [Removed]

■ 36. Effective December 28, 2024, § 493.1491 is removed.

■ 37. Effective December 28, 2024, amend § 493.1804 by revising paragraph (c)(1) to read as follows:

§ 493.1804 General considerations.

* * * * *

(c) * * *

(1) CMS may impose alternative sanctions in lieu of, or in addition to, principal sanctions.

* * * * *

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023–28170 Filed 12–22–23; 4:15 pm]

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Part IV

Commodity Futures Trading Commission

17 CFR Parts 43 and 45

Real-Time Public Reporting Requirements and Swap Data Recordkeeping and Reporting Requirements; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 43 and 45

RIN 3038–AF26

Real-Time Public Reporting Requirements and Swap Data Recordkeeping and Reporting Requirements

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (the ''Commission'' or the ''CFTC'') is proposing revisions to part 43 and part 45 of the Commission's regulations to: allow for continued geographic masking after the designation of the unique product identifier and product classification system (''UPI'') for swaps in the other commodity asset class; implement conforming changes in connection with the geographic masking requirement; add reportable data fields to appendix A to part 43 and appendix 1 to part 45 that promote international harmonization and further the Commission's surveillance and analysis activities; and implement non-substantive revisions to the descriptions of the existing reportable data elements in such appendices.

DATES: Comments must be submitted on or before February 26, 2024.

ADDRESSES: You may submit comments, identified by ''Real-Time Public Reporting Requirements and Swap Data Recordkeeping and Reporting Requirements, RIN 3038–AF26,'' by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (''FOIA''), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all submissions from *https://www.comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

FOR FURTHER INFORMATION CONTACT: Owen J. Kopon, Associate Chief Counsel, at (202) 418–5360 or *okopon@cftc.gov,* Division of Market Oversight (''DMO''); Alicia Viguri, Assistant Chief Counsel, at (202) 418–5219 or *aviguri@cftc.gov,* DMO; Isabella Bergstein, Assistant Chief Counsel, at (202) 418–5182 or *ibergstein@cftc.gov,* DMO; Chase Lindsey, Assistant Chief Counsel, at (202) 418–5231 or *clindsey@cftc.gov,* DMO; Kate Mitchel, Associate Director, at (202) 418–5871 or *kmitchel@cftc.gov,* Division of Data (''DOD''); Robert Stowsky, IT Specialist, at (202) 418–5104 or *rstowsky@cftc.gov,* DOD; John Roberts, Research Analyst, at (202) 418–5943 or *jroberts@cftc.gov,* Office of the Chief Economist (''OCE''); Lee Baker, Research Economist at (202) 418–5175 or *lbaker@cftc.gov,* OCE; in each case at the Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

The Commission's real-time public reporting and swap data reporting regulations were first adopted in 2012, and are located in parts 43 and 45 of the Commission's regulations.[2] The 2012 Real-Time Public Reporting of Swap Transaction Data Final Rule (the ''2012 RTR Final Rule'') set forth regulations that require swap counterparties, swap execution facilities (''SEFs''), and designated contract markets (''DCMs'') to report publicly reportable swap transactions (''PRST'') to swap data repositories (''SDRs'').[3] Additionally, the 2012 RTR Final Rule set forth regulations that require SDRs to publicly disseminate swap transaction and pricing data (''STAPD'') in real-time, subject to certain exceptions.[4]

In the 2012 Swap Data Recordkeeping and Reporting Requirements Final Rule (''2012 SDRR Final Rule''), the Commission implemented the swap data reporting rules. The part 45 regulations require SEFs, DCMs, and reporting counterparties (''RCPs'') (collectively, ''Reporting Entities'') to report swap data to SDRs.[5] SDRs collect and maintain data related to swap transactions, making such data electronically available for regulators or the public.

In 2013, the Commission adopted a block trade rule[6] to implement the statutory requirements of Commodity Exchange Act (''CEA'') section 2(a)(13)(E)(i)–(iv).[7] In 2016, the Commission amended part 45 to set forth swap data reporting obligations with respect to cleared swaps.[8]

In 2020, the Commission amended part 43 and part 45 by issuing a new Real-Time Public Reporting Requirements final rule (the ''2020 RTR Final Rule'')[9] and Swap Data Recordkeeping and Reporting Requirements final rule (the ''2020 SDRR Final Rule'')[10] (collectively the ''2020 Final Rules''). The 2020 RTR Final Rule revised the method and timing for real-time reporting and public dissemination, generally and for specific types of swaps; the delay and anonymization of the public

[1] 17 CFR 145.9.

[2] *See* 17 CFR parts 43, 45; Final Rule, Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182 (Jan. 9, 2012); Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012).

[3] *See* 2012 RTR Final Rule, 77 FR 1182; 17 CFR 43.3(a).

[4] *See* 2012 RTR Final Rule, 77 FR 1182; 17 CFR 43.3(b), 43.4(c) and (d).

[5] *See* 2012 SDRR Final Rule, 77 FR 2136; 17 CFR 45.3, 45.4.

[6] Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 78 FR 32866 (May 31, 2013) (the ''Block Trade Final Rule'').

[7] These CEA sections contain provisions (*e.g.,* time delays) that the Commission must include in its required rulemakings governing public reporting of STAPD for the categories of swaps set forth in CEA sections 2(a)(13)(C)(i) and (ii), 7 U.S.C. 2(a)(13)(C)(i) and (ii). *See* Notice of Proposed Rulemaking, Real-Time Public Reporting Requirements, 85 FR 21516 n.5 (Apr. 17, 2020) (the ''2020 RTR NPRM'').

[8] Amendments to Swap Data Recordkeeping and Reporting Requirements for Cleared Swaps, 81 FR 41736 (June 27, 2016).

[9] Real-Time Public Reporting Requirements, 85 FR 75422 (Nov. 25, 2020) (the ''2020 RTR Final Rule'').

[10] Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 (Nov. 25, 2020) (the ''2020 SDRR Final Rule'').

dissemination of block trades and large notional trades; the standardization and validation of real-time reporting fields; the delegation of specific authority to Commission staff; and the clarification of specific real-time reporting questions and common issues.[11]

The 2020 SDRR Final Rule generally revised the reporting regulations to: streamline the requirements for reporting swaps; require SDRs to validate swap reports; permit the transfer of swap data between SDRs; alleviate reporting burdens for non-swap dealer (''SD'')/major swap participant (''MSP'') reporting counterparties; and harmonize with international technical guidance the swap data elements that counterparties are required to report to SDRs.[12]

To ensure that the Commission continues to receive accurate and high-quality data on swap transactions for its regulatory oversight role, as well as address international swap reporting developments, the Commission proposes revisions to parts 43 and 45 to: allow for geographic masking after designation of the UPI for swaps falling within the other commodity asset class; [13] implement conforming changes in connection with the geographic masking requirement; add reportable data fields to appendix A to part 43 and appendix 1 to part 45; and implement non-substantive revisions to the descriptions of the existing reportable data elements in such appendices.

B. International Harmonization

Since November 2014, regulators overseeing major derivatives jurisdictions and markets, including the CFTC, have come together through the Bank for International Settlements Committee on Payments and Market Infrastructures (''CPMI'') and the International Organization of Securities Commissions (''IOSCO'') working group for the harmonization of key over-the-counter (''OTC'') derivatives data elements (''Harmonisation Group'') to develop global guidance regarding the definition, format, and usage of key OTC derivatives data elements reported to trade repositories (''TRs''), including the unique transaction identifier (''UTI''), the UPI, and other critical data elements (''CDE'').[14] The Harmonisation Group published Guidance on the Harmonisation of Unique Transaction Identifier (''UTI Technical Guidance'') [15] and Technical Guidance on the Harmonisation of the Unique Product Identifier (''UPI Technical Guidance'') [16] in February and September 2017, respectively.[17] In April 2018, the Harmonisation Group published Technical Guidance on the Harmonisation of Critical OTC Derivatives Data Elements (other than UTI and UPI) (''CDE Technical Guidance'').[18]

In the UPI Technical Guidance, CPMI and IOSCO specify the requirements necessary for a product identifier to facilitate the reporting of swap data to TRs and the aggregation of such data by authorities.[19] CPMI and IOSCO concluded that semantically meaningless codes should be assigned to each unique product, with the product attributes associated with each code discoverable by reference to standardized tables (''Reference Data Library'' or ''UPI Taxonomy'').[20] The UPI Technical Guidance also requires that the Reference Data Library contain specific reference data elements that vary by asset class. These required reference data elements detail the asset class, asset class sub-types, underlying asset, and other swap product attributes.[21] The UPI Technical Guidance concluded that a UPI should satisfy fifteen distinct technical principles,[22] and appointed the Financial Stability Board (''FSB'') [23] to designate one or more service providers to issue product codes and operate and maintain the Reference Data Library. In May 2019, the FSB designated the Derivatives Service Bureau Limited (''DSB'') as the UPI service provider.[24]

The CDE Technical Guidance provides technical guidance on the definition, format, and allowable values of critical data elements that are reported to TRs and important to facilitate aggregation by authorities.[25] A second version of the CDE Technical Guidance was published in September 2021 and included corrections to the April 2018 CDE Technical Guidance to facilitate the jurisdictional implementations of the CDE Technical Guidance.[26] The third version of the CDE Technical Guidance (the ''2023 CDE Technical Guidance'') was published in September 2023 and includes certain revisions and new data elements deemed necessary to further improve standardization and understanding of swap data.[27]

The Commission is part of the CDE Technical Guidance Harmonisation Group. In this role, Commission staff works alongside representatives from several countries to provide feedback regarding the data elements, as well as participate in CDE Technical Guidance public consultations, related industry workshops, and conference calls.[28]

The CDE Technical Guidance is global guidance addressed to authorities [29] that ''takes account of relevant international technical standards where available and is jurisdiction-agnostic, thus enabling the consistent global aggregation of OTC derivatives transaction data.'' [30] As emphasized in the 2020 SDRR Final Rule, the Commission believes the implementation of the CDE Technical Guidance will improve the

[11] *See* 2020 RTR Final Rule, 85 FR at 75422.

[12] *See* 2020 SDRR Final Rule, 85 FR at 75503, 75504.

[13] Other commodity, as used in this notice of proposed rulemaking, shall have the meaning ascribed to such term in § 43.2 (*i.e.,* any commodity that is not categorized in the interest rate, credit, foreign exchange or other asset classes as may be determined by the Commission).

[14] 2020 SDRR NPRM, 85 FR at 21579.

[15] CPMI–IOSCO, Technical Guidance, Harmonisation of the Unique Transaction Identifier (Feb. 2017), available at *https://www.iosco.org/library/pubdocs/pdf/IOSCOPD557.pdf* (''UTI Technical Guidance'').

[16] CPMI and IOSCO, Technical Guidance: Harmonisation of the Unique Product Identifier, (Sept. 2017), available at *https://www.iosco.org/library/pubdocs/pdf/IOSCOPD580.pdf* (''UPI Technical Guidance'').

[17] 2020 SDRR NPRM, 85 FR at 21579–21580.

[18] The CDE Technical Guidance was finalized following consultative reports in September 2015, October 2016, and June 2017. *See* CPMI–IOSCO, Technical Guidance, Harmonisation of Critical OTC Derivatives Data Elements (other than UTI and UPI) (Apr. 2018), available at *https://www.bis.org/cpmi/publ/d175.pdf.*

[19] *See Order Designating the Unique Product Identifier and Product Classification System to be Used in Recordkeeping and Swap Data Reporting,* 88 FR 11790, 11791 (Feb. 24, 2023) (the ''February 2023 UPI Order''); UPI Technical Guidance at 3.

[20] February 2023 UPI Order at 11791; UPI Technical Guidance at 21.

[21] February 2023 UPI Order at 11791.

[22] *Id.* The fifteen technical principles identified by CPMI and IOSCO are: jurisdiction neutrality, uniqueness, consistency, persistence, adaptability, clarity, ease of assignment/retrieval/query, long-term viability, scope neutrality, compatibility, comprehensiveness, extensibility, precision, public dissemination, and representation.

[23] *Id.* The FSB is an international body that monitors and makes recommendations about the global financial system. The Commission, though not an FSB member, is a member of IOSCO.

[24] February 2023 UPI Order at 11791; FSB, Press Release: FSB designates DSB as Unique Product Identifier Service Provider (May 2, 2019), available at *https://www.fsb.org/2019/05/fsb-designates-dsb-as-unique-product-identifier-upi-service-provider/.*

[25] 2020 SDRR NPRM, 85 FR at 21580.

[26] CPMI–IOSCO, Harmonisation of Critical OTC Derivatives Data Elements (other than UTI and UPI), Revised CDE Technical Guidance—Version 2 (''Revised CDE Technical Guidance''), at 11 (Sept. 2021), available at *https://www.leiroc.org/publications/gls/roc_20210922.pdf.*

[27] CPMI–IOSCO, Harmonisation of Critical OTC Derivatives Data Elements (other than UTI and UPI), Revised CDE Technical Guidance—Version 3, (Oct. 2023), available at *https://www.leiroc.org/publications/gls/roc_20230929.pdf.*

[28] 2020 SDRR Final Rule, 85 FR at 75505.

[29] Revised CDE Technical Guidance—Version 2 at 10.

[30] *See* BIS, Harmonisation of Critical OTC Derivatives Data Elements (other that UTI and UPI)—Technical Guidance (Apr. 2018), available at *https://www.bis.org/cpmi/publ/d175.htm.*

harmonization of TRs data across FSB member jurisdictions. Wide implementation would allow market participants to report swap data to several jurisdictions in the same format, supporting data aggregation for the analysis of global systemic risk in swap markets.[31]

The amendments in this proposal demonstrate the Commission's commitment to the development of global guidance on key OTC derivatives data elements reported to TRs to achieve international harmony in the area of swaps reporting.

C. Statutory and Regulatory Framework for Real-Time Public Reporting and Swap Data Recordkeeping and Reporting

Section 2(a)(13) of the CEA authorizes and requires the Commission to promulgate rules that provide for the public availability of STAPD in real-time in such form and at such times as the Commission determines appropriate to enhance price discovery.[32] CEA sections 2(a)(13)(C) and (E) reflect Congress' intent that regulators ''ensure that the public reporting of swap transactions and pricing data does not disclose the names or identities of the parties to the transactions.'' [33]

Specifically, section 2(a)(13)(C)(iii) of the CEA requires that the Commission prescribe rules that maintain the anonymity of business transactions and market positions of the counterparties to an uncleared swap. Section 2(a)(13)(E)(i) of the CEA directs the Commission to protect the identities of counterparties to swaps subject to the mandatory clearing requirement, swaps excepted from the mandatory clearing requirement, and voluntarily cleared swaps.[34]

The Commission implemented the provisions of section 2(a)(13) of the CEA by adopting the 2012 RTR Final Rule on January 9, 2012. The real-time reporting regulations are located in part 43 and establish, *inter alia:* (1) the entities or persons responsible for reporting STAPD; (2) the entities or persons responsible for publicly disseminating such data; and (3) the data fields and guidance on the appropriate format and manner for STAPD to be reported to the public in real-time.[35]

The 2012 RTR Final Rule required reporting parties, SEFs and DCMs to report the actual underlying asset(s) of PRSTs to an SDR.[36] The SDR, in turn, is required to publicly disseminate the actual underlying asset(s) of all publicly reportable swap transactions in the interest rate, credit, equity, and foreign exchange asset classes.[37] SDRs are similarly required to publicly disseminate the actual underlying asset(s) for certain swaps in the other commodity asset class, subject to the anonymity protections set out in § 43.4(c)(4).[38]

For all swaps in the interest rate, credit, foreign exchange and equity classes, the Commission determined that the actual underlying asset would be disseminated, regardless of whether a swap was executed on or pursuant to the rules of a SEF or DCM, or if it was an off-facility swap.[39] With respect to swaps in the other commodity asset class, § 43.4(d)(4)(ii) directed that, if the PRST referenced, or was economically related to, any of the ''Enumerated Physical Commodity Contracts and Other Contracts'' listed in appendix B to part 43, or if the swaps were executed on or pursuant to the rules of a SEF or DCM, the actual underlying physical commodity or referenced price or index must be publicly disseminated by the SDR.[40]

However, the Commission determined that all off-facility swaps in the other commodity asset class that did not fall under § 43.4(d)(4)(ii) would not be required to comply with the real-time reporting and public dissemination requirements under part 43 because of the increased likelihood that public dissemination of the underlying asset could disclose the identity, business transactions or market positions of a counterparty, until the adoption of special accommodations in a future Commission release to address these concerns.[41]

The Block Trade Final Rule addressed the public dissemination of STAPD for the group of other commodity swaps that were not covered under § 43.4(d)(4)(ii) by adding § 43.4(d)(4)(iii) and appendix E to part 43. Section 43.4(d)(4)(iii) mandated that SDRs must publicly disseminate the details about the geographic location of the underlying assets of the other commodity swaps not described in § 43.4(d)(4)(ii) pursuant to appendix E to part 43. Appendix E provides top-coding for various geographic regions. [42] Hence, by complying with appendix E, the SDRs would mask or disguise the geographic details related to the underlying assets of a swap when publicly disseminating such STAPD.[43] In addition to appendix E, the Block Trade Final Rule added 13 contracts to appendix B for which an SDR would be required to publicly disseminate the actual underlying asset without geographic masking.

As previously mentioned, the Commission amended parts 43 and 45 in November 2020. Among other objectives, the 2020 Final Rules revised the method and timing for swap real-time reporting and public dissemination, the requirements for swap reporting, and defined and adopted swap data elements that harmonize with international technical guidance.[44]

In its 2020 Notice of Proposed Rulemaking: Real-Time Public Reporting Requirements (''2020 RTR NPRM''), the Commission proposed eliminating appendix B to part 43 and former § 43.4(d)(4)(ii), which required that SDRs publicly disseminate the actual underlying assets of certain swaps in the other commodity asset class that either (i) reference one of the contracts described in appendix B to part 43 or (ii) are economically related to such contracts. The rationale for the proposal was to extend the geographic masking for all of the underlying assets for the other commodity asset class, based on the Commission's belief that other commodity swaps referencing, or economically related to, the contracts in appendix B could be sufficiently bespoke to warrant the additional masking.[45]

After considering whether the proposed geographic masking expansion outweighed the associated reduction in transparency, the Commission declined to adopt the proposed revisions to the masking requirements. The Commission

[31] 2020 SDRR Final Rule, 85 FR at 75540.

[32] 7 U.S.C. 2(a)(13); Notice of Proposed Rulemaking, Real-Time Public Reporting of Swap Transaction Data, 75 FR 76140, 76141 (Dec. 7, 2010).

[33] *See* Notice of Proposed Rulemaking, Real-Time Public Reporting of Swap Transaction Data, 75 FR 76140, 76150 n.46 (Dec. 7, 2010).; 156 Cong. Rec. S5921 (daily ed. July 15, 2010) (statement of Sen. Blanche Lincoln).

[34] *See* Block Trade Final Rule, 78 FR at 32867.

[35] 2012 RTR Final Rule, 77 FR at 1183.

[36] This requirement was originally adopted as 17 CFR 43.4(d)(2), but has since been re-designated as 17 CFR 43.4(c)(2) in the 2020 RTR Final Rule.

[37] 17 CFR 43.4(c)(3).

[38] 17 CFR 43.4(c)(4).

[39] 2012 RTR Final Rule at 1209; 17 CFR 43.4(c)(3) and (4).

[40] 2012 RTR Final Rule at 1211–1212; 17 CFR 43.4(c)(4)(ii). Appendix B listed 28 ''Enumerated Physical Commodity Contracts'' as well as 1 additional contract—swaps referenced to Brent Crude Oil (ICE) or economically related to Brent Crude Oil (ICE)—under the ''Other Contracts'' section. The 2020 RTR Final Rule relocated § 43.4(d)(4) to § 43.4(c)(4). 85 FR at 75439.

[41] 2012 RTR Final Rule, 77 FR at 1211.

[42] Block Trade Final Rule, 78 FR at 32910, 32938, 32941.

[43] *Id.* at 32909.

[44] 2020 RTR Final Rule, 85 FR at 75422; and 2020 SDRR Final Rule, 85 FR at 75503.

[45] 2020 RTR NPRM, 85 FR at 21530.

determined that the basis for adopting § 43.4(d)(4) in 2012 remained operative and, as such, left Appendices B and E the same as had been adopted in the 2012 RTR Final Rules and the Block Trade Final Rule, respectively.[46]

Section 21(b) of the CEA directs the Commission to prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered SDR.[47] In furtherance of this mandate, in adopting the 2020 Final Rules the Commission reviewed the STAPD data fields in appendix A to part 43 and the swap data elements in appendix 1 to part 45 and determined that the STAPD data fields in appendix A to part 43 would be a subset of the part 45 swap data elements in appendix 1 to part 45. In an effort to harmonize both sets of data, the Commission also reviewed the CDE Technical Guidance to determine which data elements the Commission could adopt.[48] In addition to adopting and including the CDE Technical Guidance Data Elements in appendix A and appendix 1, the Commission, listed additional CFTC-specific data elements that support the Commission's regulatory responsibilities in both appendices.[49]

Simultaneous with the adoption of the 2020 Final Rules, Commission staff published a technical specification setting forth the form and manner for reporting the required swap data elements under parts 43 and 45 (the ''Technical Specification''). The Technical Specification provides technical guidance on the definition, format, allowable values and validation rules for those data elements required to be reported and publicly disseminated pursuant to part 43, as well as the reportable data elements required to be reported to SDRs under part 45. Commission staff revised the Technical Specification in September 2021, August 2022 and March 2023 (the ''Revised Technical Specification'').[50]

As discussed above, the Commission has been heavily involved in the international harmonization efforts of swap data reporting. In particular, with respect to unique identifiers, the Commission included the UPI in the 2012 RTR Final Rule[51] and the 2012 SDRR Final Rule, as well as the Data Element Appendices.[52] In the 2020 RTR Final Rule, the Commission included the UPI in the revised Data Element Appendices. The Commission also removed § 43.4(e), which gave SDRs discretion regarding what fields to publicly disseminate after a UPI exists, as the fields required to be publicly disseminated are included in appendix A to part 43, as modified by the 2020 RTR Final Rule.[53] The requirement to report and disseminate the UPI is set out through the inclusion of the UPI in appendix A to part 43.[54]

Section 45.7 provides that each swap must be identified in all recordkeeping and all swap data reporting pursuant to part 45 by means of a UPI and product classification system acceptable to the Commission, when such an identifier and classification system has been designated by the Commission. The UPI and product classification system are required to identify and describe the swap asset class and the sub-type within that asset class to which the swap belongs, and the underlying product for the swap, with sufficient distinctiveness and specificity to enable the Commission and other financial regulators to fulfill their regulatory responsibilities and to assist in real time reporting of swaps in part 43.[55]

Section 45.7 further provides that, once the Commission determines that a UPI and product classification system is available for use, the Commission shall designate the UPI and product classification system by means of an order published in the **Federal Register** and on the Commission's website. The designation order will include the notice of the designation, the contact information of the issuer of such unique product identifiers, and information concerning the procedure and requirements to obtain UPIs and use the product classification system. Finally, § 45.7 directs that each registered entity and swap counterparty use the UPI and product classification system in all recordkeeping and swap data reporting once designated by the Commission. Prior to such designations, the regulation provisionally mandates use of the internal product identifier or product description used by the SDR to which a swap is reported in all recordkeeping and swap data reporting pursuant to part 45.[56]

On February 16, 2023, the Commission issued the February 2023 UPI Order designating the UPIs issued by the DSB (''DSB UPIs'') for swaps in the credit, equity, foreign exchange, and interest rate asset classes as the UPI and product classification system to be used in recordkeeping and swap data reporting pursuant to the Commission's regulations, pursuant to section 21(b) of the Act and Commission regulation § 45.7.[57]

The Commission determined that the DSB UPIs are acceptable and satisfy the criteria mandated by § 45.7, as they identify and describe the swap products with sufficient distinctiveness and specificity to: (i) enable the Commission and other regulators to fulfill their regulatory responsibilities, and (ii) assist in real-time public reporting of swap transaction and pricing data.[58]

As prescribed in the February 2023 UPI Order, registered entities and swap counterparties shall use the DSB UPIs for swaps in the interest rate, credit, foreign exchange and equity classes in all recordkeeping and swap data reporting pursuant to part 45, as well as in real-time public reporting as required by part 43. The Commission expects registered entities and swap counterparties to use DSB UPIs in the aforementioned swap asset classes for part 45 recordkeeping and swap data reporting and part 43 real-time public reporting purposes by no later than January 29, 2024.[59]

A designation of a UPI for swap products in the other commodity asset classes[60] was not made contemporaneously with the other asset classes. This delay has allowed additional time to ensure that appropriate anonymity protections continue to be in place for the swaps in the other commodity asset class once UPI is implemented in that asset class. Specifically, the Commission's regulations balance the CEA's mandate to provide for the public dissemination of STAPD, while maintaining the anonymity of business transactions and market positions of the counterparties to a swap. Geographic locations, such as delivery points, are often key product characteristics of the other commodity asset class swap products. The

[46] The Commission did make minor technical edits and relocated § 43.4(d)(4) to § 43.4(c)(4). 2020 RTR Final Rule, 85 FR at 75439.

[47] 7 U.S.C. 24a(b)(1).

[48] 2020 RTR Final Rule, 85 FR at 75457; 2020 SDRR Final Rule, 85 FR at 75540.

[49] 2020 SDRR Final Rule, 85 FR at 75540.

[50] CFTC, Parts 43 and 45 Technical Specification (March 2023), available at *https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_18_RealTimeReporting/index.htm* and *https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_17_Recordkeeping/index.htm.*

[51] 2012 RTR Final Rule, 77 FR at 1212.

[52] 2012 SDRR Final Rule, 77 FR at 2166.

[53] See 85 FR at 75439.

[54] The use of the UPI in real-time public reporting is also referenced in § 45.7 of the Commission's regulations.

[55] 17 CFR 45.7

[56] *Id.*

[57] *See* the February 2023 UPI Order, 88 FR at 11790.

[58] *Id.* at 11792.

[59] *Id.* at 11793.

[60] The other commodity swap asset class includes all swaps not contained in the credit, equity, foreign exchange, and interest rate asset classes. *See* 17 CFR 45.1.

designation of a UPI code for other commodity asset class swaps would trigger the obligation under parts 43 and 45 that such UPI be included in each public dissemination and confidential swap report.[61] Without modifications to part 43, this could result in RCPs reporting to SDRs a UPI that contains detailed geographic information in contravention of § 43.4(c)(4)(iii) and appendix E to part 43, as explained further in section II.A. below.

To achieve international swap data standardization and promote post-trade transparency and price discovery,[62] the Commission proposes the following modifications to parts 43 and 45 of the Commission's regulations: (i) amend § 43.4(c) to allow for geographic masking after the designation of the UPI for the other commodity asset classes, (ii) implement conforming changes to § 43.4(c) and appendix E to part 43 in connection with the geographic masking requirement, (iii) implement modifications to § 45.7(b) with regards to the Commission's authority to subject a UPI designation order to conditions as deemed appropriate, and to limit, suspend, or withdraw such designation order after appropriate notice and opportunity to respond; and (iv) implement conforming and technical revisions to the title of § 45.7 and the text of § 45.7(c)(2).

Additionally, the Commission proposes modifications to appendix A to part 43 and appendix 1 to part 45 (the ''Data Element Appendices'') to (v) add additional data elements, and (vi) modify the descriptions of the existing reportable data elements to harmonize with changes done at the international level and to remove form and manner detail from the Data Element Appendices that is set out in the Technical Specification.

II. Proposed Amendments to Part 43 and Part 45

The adoption and implementation of the UPI and product classification system for swaps in the other commodity asset class requires certain modifications to part 43. As such, the Commission hereby proposes modifications to § 43.4(c) to allow for geographic masking after the designation of the UPI and product classification system for swaps in the other commodity asset class. In addition, the Commission is proposing modifications to § 45.7(b) with regards to the Commission's authority to subject a UPI designation order to conditions as deemed appropriate, and to limit, suspend, or withdraw such designation order. Finally, the Commission is proposing certain conforming and technical changes to § 43.4(c), appendix E to part 43, § 45.7, and § 45.7(c)(2).

A. Proposed Addition of New § 43.4(c)(5)

Prior to the implementation of the UPI and product classification system for swaps in the other commodity asset class, the regulatory structure must be in place to satisfy the CEA mandate to require real-time reporting that will enhance price discovery while also ensuring the anonymity of the swap counterparties and the confidentiality of business transactions and market positions.[63] The Commission is proposing to further implement this mandate by requiring Reporting Entities to submit to the SDRs a UPI that limits the geographic detail of the underlying asset pursuant to appendix E to part 43, for certain swap transactions in the other commodity asset class, when a UPI and product classification system has been designated by the Commission pursuant to regulation 45.7. The Commission is also proposing to require SDRs to disseminate the appropriately geographically limited UPI that the Reporting Entities report to the SDRs.

As previously discussed, CEA section 2(a)(13) directs the Commission to prescribe regulations providing for the public availability of transaction and pricing data for certain swaps. However, CEA sections 2(a)(13)(C) and (E) limits this direction by mandating the protection of the anonymity of swap counterparties, business transactions and market positions to swap transactions. The Commission implemented the statutory mandates through the adoption of the 2012 RTR Final Rule and the Block Trade Final Rule in 2012 and 2013, respectively. Notwithstanding the requirement to publicly disseminate data that discloses the underlying asset(s) of PRSTs, the 2012 RTR Final Rule prohibited an SDR from publicly disseminating STAPD in a manner that discloses or otherwise facilitates the identification of a swap counterparty. The Block Trade Final Rule required the public dissemination of certain swaps in the other commodity asset class to limit the geographic detail of the underlying asset pursuant to appendix E to part 43.

The designation of the UPI for swaps in the other commodity asset class highlight operational complexities arising from the statutory requirements to both provide for the public availability of STAPD and also ensure the anonymity of the parties to a PRST. The implementation of a UPI code for other commodity asset class swaps pursuant to regulation 45.7 would trigger the obligation under parts 43 and 45 that the same UPI be included in each public dissemination and confidential swap report.[64] However, an anonymity issue arises because geographic locations, such as delivery points, are often key product characteristics of certain other commodity asset class swap products and, consequently, included in the underlying UPI reference data library elements. This would mean that key characteristics of each product, such as geographic locations, would be potentially publicly accessible, creating a risk that public dissemination of a UPI code pursuant to part 43 could inadvertently allow for the identification of the counterparties to the specific other commodity swap transactions.

Without modifications to part 43, Reporting Entities would report to SDRs a UPI that contains detailed geographic information, dissemination of which could be contrary to § 43.4(c)(4)(iii) and appendix E. Without a rule amendment, SDRs would not be permitted to publicly disseminate a UPI for certain swaps in the other commodity asset class that require geographic masking under the Commission's current regulations, as such dissemination would violate § 43.4(c)(4)(iii).

Therefore, an extension of the UPI mandate to the other commodity asset class must provide for the geographic masking requirement mandated by § 43.4(c)(4)(iii). Under proposed § 43.4(c)(5)(ii), Reporting Entities would be obligated to comply with the requirement to provide, and SDRs with their requirement to disseminate, a description of the underlying asset(s) that limits geographic detail pursuant to paragraph (c)(4)(iii) of § 43.4 by providing or disseminating, as applicable, STAPD that includes a UPI that identifies any specific delivery point or pricing point pursuant to appendix E to part 43.

The proposed rule amendment harmonizes the competing obligations under § 43.4(c)(4)(iii) related to limiting geographic detail in public dissemination of certain swaps in the other commodity asset class and those under appendix A to disseminate a UPI, which may contain information that is

[61] 2012 SDRR Final Rule, 77 FR at 2166; 17 CFR 45.7(c)(1).

[62] 2012 RTR Final Rule, 77 FR at 1182, 1185.

[63] *Id.* at 1209.

[64] 17 CFR 45.7(c)(1); 17 CFR part 43, appendix A and 17 CFR part 45, appendix 1, (Data Element # 87 (Unique Product Identifier UPI) (noting that the Commission will designate a UPI pursuant to § 45.7).

not adequately geographically masked. However, the geographically limited UPI will not satisfy part 45 reporting obligations. Existing part 45 requires specific delivery and pricing point details to be reported, which would not be included in UPIs that disclose a more generic geographic location to comply with § 43.4(c)(4)(iii). Therefore, Reporting Entities will also need to report a UPI that contains those details in order to comply with the part 45 reporting requirements.

Accordingly, proposed § 43.4(c)(5)(iii) provides that, notwithstanding the requirement under § 43.4(c)(5)(ii) to provide and disseminate a geographically-masked UPI pursuant to appendix E to part 43, Reporting Entities shall comply with part 45 reporting obligations by providing to SDRs a separate UPI that does not limit the geographic detail of the underlying assets. Finally, proposed § 43.4(c)(5)(i) provides that, for swaps in the interest rate, credit, equity, and foreign exchange asset classes, as well as swaps in the other commodity asset class described in § 43.3(c)(4)(ii), Reporting Entities shall comply with their requirement to provide an actual description of the underlying asset(s) by providing STAPD that includes a UPI system, once such identifier has been designated by the Commission to be used in recordkeeping and swap data reporting pursuant to regulation 45.7. Proposed § 43.3(c)(5)(i) also provides that an SDR will be deemed to have complied with the requirement to disseminate an actual description of the underlying asset(s) by disseminating STAPD that includes a UPI that has been designated by the Commission.

B. Conforming Changes to § 43.4(c) and Appendix E

The Commission is proposing to make additional conforming and technical changes to § 43.4(c) and appendix E to align with the proposed modifications discussed above.

Existing § 43.4(c)(2) requires Reporting Entities to provide an SDR with STAPD that includes an actual description of the underlying asset. Because, as discussed above, the requirement to provide a UPI and, if applicable, a UPI that limits geographic information, is being proposed in § 43.4(c)(5), the proposal implements a conforming revision to indicate that the requirement in § 43.4(c)(2) to provide an actual description of the underlying asset applies to PRST in the interest rate, credit, equity, and foreign exchange asset classes. Similarly, the Commission is proposing to address the requirement that Reporting Entities provide the underlying asset to an SDR in § 43.4(c)(4), as modified. This change is not meant to be substantive, but rather is intended as a technical revision to group requirements that are specific to an asset class within the same paragraph. The Commission is proposing technical revisions to the title and text of § 43.4(c)(4) to clarify and conform to the amendments proposed in section II.A above. As such, the revision to the title clarifies that the section addresses both the reporting and public dissemination of the underlying asset(s) for certain swaps in the other commodity asset class. The technical revision to § 43.4(c)(4) and § 43.4(c)(4)(i) identifies the Reporting Entities obligated to provide the SDRs with certain STAPD. Additionally, the proposed technical revisions to § 43.4(c)(4)(ii) and (iii) address the obligation to provide the underlying asset(s) of swaps in the other commodity asset class as stipulated in each of these sections, to conform with the rest of the regulatory text in the section.

Appendix E to part 43 includes tables E1 and E2 which must be used by SDRs to disseminate any specific delivery points or pricing points for PRSTs in the other commodity asset class as required by § 43.4(c)(4)(iii). The Commission proposes to add introductory language for consistency with the proposed amendments to § 43.4(c) described above and proposed new § 43.4(c)(5)(ii).

C. Proposed Amendments to § 45.7(b)

In addition to the changes to part 43 discussed above, the Commission is also proposing modifications to § 45.7(b) with regards to the Commission's authority to condition or revoke a UPI designation order. As stated above, § 45.7 provides that when the Commission determines that a UPI and product classification system is available for use and meets the requirements of § 45.7, the Commission shall designate the unique product identifier and product classification system to be used in recordkeeping and swap data reporting by means of a Commission order published in the **Federal Register** and on the website of the Commission.

Section 45.7(a) establishes the requirements that the UPI and product classification system must meet to enable the Commission and other financial regulators to fulfill their regulatory responsibilities and to assist in real time reporting of swaps as provided in the CEA and part 43. The Commission is proposing to modify § 45.7 to address the Commission's authority to condition a designation of a UPI and product classification system. For example, the Commission may determine that it is appropriate to condition the designation of a UPI and product classification system on such an identifier continuing to meet certain international standards related to distinctiveness and specificity. As another example, the Commission may include as a condition of designation an implementation date for use of such UPI and product classification system. The Commission proposes adding the following language at the end of § 45.7(b)(2); The Commission may subject such designation order to conditions to ensure the unique product identifier and product classification system continue to meet the requirements set out in paragraph (a) above. The Commission may also set, in such designation order, a date on which such designation shall be effective. The Commission is also proposing to address the Commission's authority to limit, suspend, or revoke a designation order previously issued by the Commission. The Commission proposes to add § 45.7(b)(3), to direct that if the Commission determines that a unique product identifier and product classification system, subject to a designation order pursuant to paragraph (b) of this section, no longer satisfies the requirements set forth in this section, the Commission may limit, suspend, or withdraw the designation order consistent with the Act after appropriate notice and opportunity to respond. This amendment seeks to address the unlikely scenario where a previously designated UPI and product classification system fails to meet the requirements set out in § 45.7.

Finally, the Commission proposes conforming and technical revisions to § 45.7. The Commission proposes adding ''and Product Classification System'' to the title of § 45.7 for consistency with the rest of the regulatory text. The Commission also proposes a revision to the language in § 45.7(c)(2) to conform to new proposed § 45.7(b)(3), which provides for the withdrawal of a previously issued designation order. Commission regulation 45.7(c)(2) is meant to set out obligations that are applicable in the absence of a designated UPI and product classification system. The proposed modifications are meant to address both a situation where a UPI and product classification system has not yet been designated by the Commission, and, now, a situation where a UPI and product classification system was previously designated but is no longer

in effect, as contemplated by new, proposed § 45.7(b)(3).

III. Additional Swap Data Elements Reported to the Commission and to Swap Data Repositories

A. Background

The Commission is proposing to add and further standardize the required data elements and definitions set out in the Data Element Appendices. The Data Element Appendices specify the current requirements for data elements reporting; [65] the Revised Technical Specification, published on the Commission's website pursuant to delegated authority, provides the form and manner specifications for reporting the required data elements.[66] Commission staff published the Revised Technical Specification on March 1, 2023.[67] The Revised Technical Specification organizes each data element from the Data Element Appendices by category and provides for the corresponding definition, format, allowable values, and validation rules for each data element.[68]

Prior to the implementation of the 2020 Final Rules, SDRs had some discretion over what swap data was reported, which led to a lack of standardization across SDRs.[69] This lack of standardization warranted the introduction of the revised Data Element Appendices and the Technical Specification. The Commission's adoption of the 2020 Final Rules standardized a significant number of data elements reported to the Commission and to the public.

When the Commission adopted the Data Element Appendices in 2020, it noted that those appendices did not address the standardization of data elements specific to swap product terms.[70] The Commission noted its expectation that a UPI would be available in two years, and that until the Commission designated a UPI pursuant to § 45.7, SDRs would continue to accept, and reporting entities would continue to report the unstandardized product-related data elements unique to each SDR.[71] As discussed above, subsequent to its 2020 Final Rules' adoption, the Commission has designated DSB as the UPI service provider and expects reporting of DSB UPIs for the interest rate, credit, foreign exchange, and equity classes to begin no later than January 29, 2024.

The Commission is proposing to update the Data Element Appendices [72] to include additional data elements. These additional data elements (1) supplement the UPI Reference Data Library with additional data elements from the 2023 CDE Technical Guidance; (2) add necessary information and address reporting quality issues; and (3) further facilitate the standardization of data elements. At the same time as the Commission is proposing to update the Data Element Appendices, staff is publishing draft updated technical specifications for reporting the swap data elements in the Data Element Appendices. Commission staff is publishing a draft updated technical specification (''Technical Specification 3.3''),[73] when this notice is published so commenters can comment on both the NPRM and the technical standards and validation conditions. Commenters are encouraged to comment on the NPRM, as well as provide feedback on the Technical Specification 3.3 that highlights the form and manner of the required fields within the Data Element Appendices pursuant to delegated authority. Commission staff is involved in international efforts for the harmonization of data elements, and the Commission welcomes comments related to the 2023 CDE Technical Guidance in accordance with the CDE Governance Arrangements [74] procedures. To simplify the organization of comments received, the additional data elements discussed below are divided into two categories: (1) fields that are included in the 2023 CDE Technical Guidance (''CDE Fields''); and (2) fields that are not included in the CDE Technical Guidance (''CFTC Fields'').

B. Proposed Data Elements From the CDE Technical Guidance

The Commission previously noted its intent to adopt the CDE Technical Guidance data elements to the extent possible.[75] The Commission also anticipated the need to update the Data Element Appendices to adopt any changes to the CDE Technical Guidance.[76] The Commission is proposing the addition of certain data elements that are internationally harmonized in the 2023 CDE Technical Guidance. The Commission believes including certain 2023 CDE Technical Guidance data elements will create significant efficiencies for reporting entities and the Commission.

The Commission is proposing to add nineteen data elements from the 2023 CDE Technical Guidance to the Data Element Appendices. These data elements are related to the following categories: Custom Baskets, Price, Product, and Notional Amounts and Quantities.

These proposed fields provide additional swap market transparency and separate data elements for various quantity, amount, and schedule date periods. This allows the Commission to access and query the data in a streamlined manner while also enabling analysis of schedule date periods with the corresponding valuations. The Commission invites comments on any of the data elements listed below.

Custom Baskets. The Commission is proposing to add five CDE data elements [77] related to custom baskets to proactively address exposure risks and to allow for the linking of constituents of a custom basket for cross-basket analysis, among other analyses. These proposed data elements would not be publicly disseminated to ensure the anonymity of the swap counterparties and the confidentiality of business transactions and market positions. The Commission currently requires

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[65] 2020 SDRR Final Rule at 75540 (highlighting the differences between swap data elements required to be reported to SDRs pursuant to part 45 in appendix 1 to part 45 and swap transaction and pricing data elements required to be reported to, and then publicly disseminated by, SDRs pursuant to part 43 in appendix A to part 43. Both the appendices are harmonized such that the swap transaction and pricing data elements are a subset of the swap data elements in appendix 1 to part 45).

[66] 17 CFR 43.7(a)(1); 17 CFR 45.15(b).

[67] CFTC Technical Specification, Version 3.2 (Mar. 1, 2023), available at *https://www.cftc.gov/media/8261/Part43_45TechnicalSpecification03012023CLEAN/download.*

[68] *Id.*

[69] 2020 SDRR Final Rule, 85 FR at 75539.

[70] *Id.* at 75540; 2020 RTR Final Rule, 85 FR at 75458 (highlighting the Commission's belief that this temporary solution will benefit SDRs such that they will only have to change their systems once when a UPI becomes available, instead of twice if the Commission created standardized product data elements before UPIs were available and then later when UPIs were designated).

[71] 2020 SDRR Final Rule, 85 FR at 75540.

[72] Staff note the proposed data elements that are not proposed to be publicly disseminated and are for regulatory reporting purposes under part 45 only will be referenced to as additions to appendix 1 of part 45. The proposed data elements that SDRs are to publicly disseminate will be referenced as additions to the Data Element Appendices.

[73] CFTC Technical Specification 3.3 will be published on the Commission's website alongside the publication of this NPRM, available at *https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_18_RealTimeReporting/index.htm* and *https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_17_Recordkeeping/index.htm.*

[74] CPMI–IOSCO, Governance Arrangements for Critical OTC Derivatives Data Elements (other than UTI and UPI) (October 2019), available at *https://www.bis.org/cpmi/publ/d186.htm* (''CDE Governance Arrangements'').

[75] 2020 RTR NPRM, 85 FR at 21542; 2020 RTR Final Rule, 85 FR at 75539–40.

[76] 2020 RTR Final Rule, 85 FR at 75539–40.

[77] These proposed data elements are Custom basket code (34), Basket constituent identifier (35), Basket constituent unit of measure (37), Basket constituent number of units (38), and Basket constituent identifier source (36), which would be added to appendix 1 to part 45.

reporting entities to report only one data element [78] related to custom baskets that is publicly disseminated.[79] Existing data element Custom Basket Indicator [80] only provides information pertaining to whether a transaction is associated with a custom basket. The Commission is proposing to add data elements to appendix 1 of part 45 because it believes that the visibility and reporting accuracy of holdings in custom baskets provides critical information.[81] For example, in order to conduct adequate market surveillance, including insider trading investigations, it is necessary to identify the constituents of a custom basket. Without this information, the Commission would be unable to determine the underlying positions that a swap counterparty maintained. The Commission is therefore proposing to adopt these internationally harmonized,[82] custom basket data elements.

Prices. The Commission is proposing to add six CDE data elements to the Data Element Appendices related to price schedules.[83] The Commission currently requires SDRs to publicly disseminate certain non-schedule related information within the price category.[84] The Data Element Appendices do not currently contain elements related to price schedules. As such, SDRs currently receive and disseminate several data elements related to price schedules as unstandardized product-related fields. The proposed price schedule data elements are critical for the Commission to receive because it is common for swap transactions to have price-related terms that vary over the duration of the swap, particularly for the equity and other commodity asset classes. These terms impact the transaction value over time. Without the reporting of these price related schedule data elements, the value of the swap transaction over time that is implied from the swap data would be misleading. The proposed fields have been internationally harmonized and are expected to be implemented across multiple jurisdictions.[85] The Commission believes that the inclusion of these data elements in the Data Element Appendices will not only further international harmonization efforts but also increase the accuracy and utility of the swap data reported to, and disseminated by, SDRs.

Product. As discussed above, there are certain proposed data elements related to underlier information that capture data not included in the UPI Taxonomy but are within the CDE Technical Guidance. Additionally, there are certain proposed data elements that are not captured in either the UPI Taxonomy or the CDE Technical Guidance. The Commission will first discuss the proposed CDE Fields specific to the product underlier, and then will discuss the proposed CFTC fields that are supplemental to the CDE Fields and the UPI Taxonomy in section III.C below.

The UPI includes granular product-level information, such as underlier and identifier information.[86] When a reporting entity submits a request for a UPI Code to the unique product identifier service provider, the reporting entity submits a set of product reference data elements.[87] When an underlier is not recognized by a unique product identifier service provider, the reporting entity will submit the value ''other'' for the Underlier ID and Underlier ID Source fields to the UPI service provider. If approved by the UPI service provider, the corresponding issued UPI Reference Data Library would not include detailed underlier information that would allow the Commission to determine the underlying product of the swap transaction. Without this granular information, the Commission would not have sufficient understanding of the financial product and would be unable to distinguish between different products that are represented by the same ''other'' underlier type. Proposed fields ''Underlier ID (Other)'' and ''Underlier ID (Other) source'' would allow for this granular information to be reported and allow the Commission to understand the characteristics of the non-standard underliers across asset classes at a level of granularity not provided in the UPI Taxonomy that resolves to the ''other'' underlier type.[88]

The Commission is proposing two additional CDE product-related fields that are necessary to understand specific product information related to the source of the price of an underlier. The UPI Taxonomy does not include the trading venue of an underlier. For example, in the case of an equity swap, although the underlier would be part of the UPI Taxonomy, if that underlier were traded on a venue in a non-U.S. jurisdiction, that venue would not be included in the UPI Taxonomy. For those transactions that occur off-venue, the source of the price of the underlier is also not included in the UPI Taxonomy. Without that source being reported, the Commission would be unable to consistently determine the benchmark value of the source of the underlier. Proposed CDE data elements ''Underlying asset trading platform identifier'' and ''Underlying asset price source'' will enable the Commission to receive critical pricing information in a consistent manner across various sources.[89] Moreover, receiving

[78] *See* CFTC Technical Specification, Version 3.2 (March 1, 2023), available at *https://www.cftc.gov/media/8261/Part43_45TechnicalSpecification03012023CLEAN/download.*

[79] 2020 RTR Final Rule, 85 FR at 75458.

[80] *See* CFTC Technical Specification, *supra* note 50, for data element Custom Basket Indicator (25).

[81] This view is shared by other financial regulators. *See, e.g., Frequently Asked Questions on Regulation SBSR,* U.S. Securities and Exchange Commission (Aug. 11, 2022), available at *https://www.sec.gov/tm/faqs-reg-sbs* (clarifying Rule 901(c)(1) requires the reporting of specific underlying reference assets); *See also* CPMI and IOSCO, Technical Guidance: Harmonisation of the Unique Product Identifier (Sept. 2017) at 20, available at *https://www.iosco.org/library/pubdocs/pdf/IOSCOPD580.pdf* (explaining that authorities have an interest in data related to any custom basket of assets underlying an OTC derivative product in order to understand the economics of the product).

[82] In addition, the European Securities and Markets Authority (ESMA) and Ontario Securities Commission (OSC), respectively, are planning to implement or have proposed to implement certain identifying information related to the frequency, creator, and underlier related information of basket creation, among other items, from the CDE Technical Guidance. *See, generally,* July 10, 2022 O.J. (L 262), available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1855&from=EN;* Proposed Amendments to OSC Rule 91–507 Trade Repositories and Derivatives Data Reporting and Proposed Changes to OSC Companion Policy 91–507CP and Proposed Changes to OSC Companion Policy 91–506CP, R.R.O. 2022—45 (OSC) (highlighting fields 120–124), available at *https://www.osc.ca/sites/default/files/2022-06/cp_20220609_91-507_trade-repositories-derivatives-data-reporting.pdf.*

[83] These proposed data elements are Price schedule-unadjusted effective date of the price (99), Price schedule-unadjusted end date of the price (100), Price schedule-price (101), Strike price schedule-Unadjusted effective date of the strike price (108), Strike price schedule-unadjusted end date of the strike price (109), and Strike price-schedule-strike price (110). These proposed data elements will be added to the Data Element Appendices.

[84] Currently, SDRs publicly disseminate nine data elements uniquely related to the commodity asset class and eight data elements uniquely related to the equity asset class in the price category. Data Field Option Premium Payment Date (#81) is not publicly disseminated.

[85] *See, e.g.* July 10, 2022 O.J. (L 262) (highlighting fields 50–52 and 135–137), available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1855&from=EN.*

[86] *See* UPI Technical Guidance *supra* note 16 at 6.

[87] *Id.* at 13–18. (highlighting that the UPI Reference Data include attributes such as ''Asset Class'', ''Instrument Type'', ''Delivery Type'', ''UPI Code'', ''CFI Code'', ''Underlier Name'', ''Underlying Asset Type'', ''Underlier ID Source'', ''Underlying ID'', among others).

[88] These proposed data elements are Underlier ID (Other) (126) and Underlier ID (Other) source (127). These proposed data elements would be added to appendix 1 to part 45.

[89] These proposed data elements are Underlying asset trading platform identifier (129) and

Continued

information specifying the underlying asset price source is critical to the Commission's benchmark manipulation surveillance efforts. In order to adequately conduct such surveillance efforts, the Commission must be able to reliably understand what source is being used to price the underlier of the swap transaction.

Finally, the proposed ''Crypto asset underlying indicator'' data element [90] provides for the identification of derivative transaction underliers that include crypto assets. This data element is particularly important given the quickly-evolving market for crypto assets and the current lack of standardization in the representation of swap transactions with crypto asset underliers.[91] The submission of this indicator will allow the Commission and the public to more easily identify those transactions that have crypto asset underliers, regardless of the underlying product. This indicator is internationally harmonized and expected to be implemented across multiple jurisdictions.[92]

Notional Amounts and Quantities. The Commission is proposing to add three data elements related to notional quantity schedules to the Data Element Appendices.[93] These data elements would be applicable to the other commodity asset class, where notional is often stated as a quantity rather than a dollar amount. While the Data Element Appendices include certain data elements related to schedules, data elements addressing the non-monetary quantities for these types of instruments are currently not included in the Data Element Appendices.[94] Similar to the discussion of the price-related schedule fields above, the notional quantity fields being proposed are necessary in order to understand the economics and value of a swap transaction changing over time. These notional quantity schedule fields are a part of the CDE Technical Guidance and expected to be adopted across multiple jurisdictions.[95]

C. Proposed CFTC Data Elements

The Commission is proposing to supplement the Data Element Appendices with data fields sourced beyond the UPI Reference Data Library and CDE Technical Guidance by adding Commission-related data elements to further standardization efforts and address data quality concerns. As discussed below, these proposed data elements will ensure the Commission has access to data needed to facilitate market oversight through surveillance and compliance review.

Primarily, the UPI system is comprised of a UPI code and associated UPI reference data. The UPI reference data elements include three levels of information: instrument type (*e.g.,* forwards, options, swaps), instrument characteristics (*e.g.,* physical delivery, Bermudan exercise), and certain information about the product (*e.g.,* elements of underliers such as identifiers). The UPI system is not designed to identify contract- or transaction-level information. The proposed data elements are intended to facilitate the reporting of information not discernable through the reporting of the UPI. As discussed below, in cases where the underlier product-level information has been assigned the value of ''other''—as may be the case for certain bespoke or basket transactions—additional information will be needed to adequately identify the transaction.

In addition to the proposed UPI-related fields, the Commission is proposing to add additional fields to the Data Element Appendices that will enhance data quality and standardization. The Commission noted the significant effort that must be done to standardize swap data.[96] Periodic review of internal processes, market transparency efforts, and proactively addressing the market's use of new technology is consistent with the Commission's mission to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation.

Thus, the Commission is proposing to add thirty data elements related to the following categories: Clearing, Counterparty, Notional Amounts and Quantities, Price, Product, and Transaction Categories. The Commission invites comments on any of the data elements listed below; additionally, Commission staff invite separate comment on the draft Technical Specification 3.3 now published on the Commission website that is intended, upon finalization, to provide technical instructions on the acceptable form and manner for transmitting required data elements to an SDR.

Clearing. The Commission is proposing to add two clearing-related fields to appendix 1 to part 45: ''Mandatory clearing indicator'' and ''Clearing member identifier source.'' [97] The current Data Element Appendices contain a number of clearing related data elements.[98] These data elements provide significant information regarding the clearing-related attributes of a given transaction, however, the currently required clearing-related data elements do not provide an indication as to whether a swap transaction is subject to mandatory clearing. For example, currently the ''Cleared'' field, which is populated with either yes, no, or intent to clear, does not enable the Commission to determine whether a

Underlying asset price source (128), which would be added to appendix 1 to part 45.

[90] The proposed data element is Crypto asset underlying indicator (130). This proposed data element will be added to the Data Element Appendices.

[91] For example, crypto asset transactions are often reported differently across transactions. However, there is currently no ISO currency code corresponding to crypto assets. *See* Kath Lockett, The down-low on digital currency, ISO focus: The New Wave of Finance (Jan. 9, 2020), available at *https://www.iso.org/files/live/sites/isoorg/files/news/magazine/ISOfocus%20(2013-NOW)/en/2020/ISOfocus_138/ISOfocus_138_en.pdf.*

[92] *See, e.g.,* July 10, 2022 O.J. (L 262) (highlighting field 12), available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1855&from=EN; See* Proposed Amendments to OSC Rule 91–507 Trade Repositories and Derivatives Data Reporting and Proposed Changes to OSC Companion Policy 91–507CP and Proposed Changes to OSC Companion Policy 91–506CP, R.R.O. 2022—45 (OSC) (highlighting field 119), available at *https://www.osc.ca/sites/default/files/2022-06/cp_20220609_91-507_trade-repositories-derivatives-data-reporting.pdf.*

[93] These proposed data elements, which would be added to the Data Element Appendices, are: Notional quantity schedule—unadjusted date on which the associated notional quantity becomes effective (57), Notional quantity schedule—unadjusted end date of the notional quantity (58), and Notional quantity schedule—notional quantity (59).

[94] Existing Data Element Appendices currently include the following data elements related to Notional Amount and Quantity schedules: Notional amount schedule—notional amount in effect on associated effective date (33); Notional amount schedule—unadjusted effective date of the notional amount (34); and Notional amount schedule—unadjusted end date of the notional amount (35).

[95] *See, e.g.,* July 10, 2022 O.J. (L 262), available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1855&from=EN; See* Proposed Amendments to OSC Rule 91–507 Trade Repositories and Derivatives Data Reporting and Proposed Changes to OSC Companion Policy 91–507CP and Proposed Changes to OSC Companion Policy 91–506CP, R.R.O. 2022—45 (OSC) (highlighting field 37–39), available at *https://www.osc.ca/sites/default/files/2022-06/cp_20220609_91-507_trade-repositories-derivatives-data-reporting.pdf.*

[96] *See* 2020 SDRR Final Rule, 85 FR at 75539.

[97] These proposed data elements are Mandatory clearing indicator (14) and Clearing member identifier source (5). Data Element Mandatory clearing indicator (14) will be added to the Data Element Appendices. Data Element Clearing member identifier source (5) will be added to appendix 1 of part 45.

[98] Appendix A of part 43 contains one clearing-related data element, Cleared (1). Appendix 1 of part 45 contains the following clearing-related data elements: Central counterparty (2), Clearing account origin (3), Clearing member (4), Clearing swap USIs (5), Clearing swap UTIs (6), Original swap USI (7), Original swap UTI (8), Original Swap SDR identifier (9), Clearing receipt timestamp (10), Clearing exceptions and exemptions—Counterparty 1 (11), and Clearing exceptions and exemptions—Counterparty 2 (12).

trade is required to be cleared or voluntarily cleared. Although the Commission previously noted that it may be able to determine this information through a separate analysis based on underlying product fields, it also noted the difficulties in obtaining such information.[99] The Commission believes that the provision of this data element will allow staff to efficiently monitor compliance with the clearing mandate. In addition, the Commission believes market participants already engage in determinations as to whether a specific transaction is subject to mandatory clearing and as such collection of this indicator should not present a significant burden to market participants.

In addition to the ''Mandatory clearing indicator'' data element, the Commission is proposing to include a ''Clearing member identifier source'' data element in appendix 1 to part 45. This data element would provide significant data quality benefits. In order for the SDRs to be able to validate values that are submitted in the ''Clearing member'' data element, the swap data repositories must know what the source of the identifier is. Because Legal Entity Identifiers (''LEIs''), natural person identifiers, and Privacy Law Identifiers (''PLIs'') have different characteristics, without knowing the relevant source for the value submitted in the ''Clearing member'' data element, adequate validations cannot be applied to that data element. This results in data quality that is lower than it would otherwise be with the implementation of the ''Clearing member identifier source.''

Counterparty. The Commission is proposing to add four counterparty-related data elements to appendix 1 to part 45 that will enhance data quality in various ways.[100] Similar to the ''Clearing member identifier source'' data element discussed above, the proposed addition of a ''Counterparty 1 identifier source'' will provide significant data quality benefits because it will more readily allow for adequate data validation of the Counterparty 1 data element.[101]

The Commission is also proposing to add three data elements that indicate the entity designations of counterparties to a transaction. ''Counterparty 1 designation'' and ''Counterparty 2 designation'' will indicate if a counterparty is a SD, MSP, derivatives clearing organization (''DCO''), or non-SD/MSP/DCO. Similarly, ''Counterparty 2 special entity'' will indicate if Counterparty 2 is a special entity. These entity designation fields are important for the Commission because many of the Commission's regulations apply based on entity designation. For example, certain business conduct standards are applicable specifically to transactions entered into with a special entity.[102] The proposed ''Counterparty 2 special entity'' data element is necessary for the Commission to be able to determine whether a special entity is a party to a given transaction. Similarly, the ''Counterparty 1 designation'' and ''Counterparty 2 designation'' data elements are necessary to determine whether, for example, a SD is a party to a transaction, which is critical to understanding both regulatory obligations as well as market dynamics.

Notional Amounts and Quantities. The Commission is proposing to add ten data [103] elements related to Notional Amounts and Quantities to appendix 1 to part 45. Nine of these data elements are specific to the other commodity asset class. These nine data elements would provide information that is necessary to understand the characteristics of the commodity transaction. These data elements provide additional information that is not included in the UPI Reference Data Library and, without adoption of these proposed elements, would not be reported once a unique product identifier and classification system is designated for the other commodity asset class. Specifically, these data elements provide information related to the load profile type, applicable hours, and days of the week for the delivery of power. This information is not included in the UPI Reference Data Library and is necessary to understand the economics of a transaction for the delivery of power.

Finally, the Commission is proposing to add the data element ''USD equivalent regulatory notional amount'' to appendix 1 to part 45.[104] This data element will allow for the consistent reporting of notional amounts for transactions denominated in U.S. dollars. The reporting of USD notional amount will allow Commission staff to more efficiently monitor swap market activity, specifically for swap dealer de minimis monitoring, part 43 market transparency calculations, and for risk surveillance purposes.

Price. The Commission is proposing to add six price-related data elements to the Data Element Appendices, three of which specifically relate to option-type instruments.[105] The proposed data elements ''Option exercise end date'', ''Option exercise frequency period'', and ''Option exercise frequency period multiplier'' will provide information that is critical to understanding the economics of a particular swap transaction. In particular, these data elements will provide key dates and schedules of the option contract, which is necessary to conduct market surveillance and identify potential cases of market manipulation.

In addition to these three price-related elements, the Commission is proposing to add three data elements related to settlement price analysis to appendix A to part 45.[106] Similar to the three proposed fields above, these fields will further market surveillance. For example, proposed ''Swap pricing method'' and ''Pricing date schedule of the swap'' fields will facilitate market surveillance and identification of situations where the value of a derivative position impacts the value of the underlying asset on the settlement day in a way that benefits the position.

Product. The Commission is proposing to add two product-related data elements to the Data Element Appendices [107] and three product-related data elements to appendix 1 to

[99] 2020 SDRR Final Rule, 85 FR at 75541 n.315.

[100] These proposed data elements are Counterparty 1 Identifier Source (16), Counterparty 1 Designation (28), Counterparty 2 Designation (29), and Counterparty 2 Special Entity (30). These proposed data elements will be added to appendix 1 to part 45.

[101] In addition, the inclusion of this field will align the Counterparty 1 elements with the Counterparty 2 elements, as ''Counterparty 2 identifier source'' is included in the existing Appendix 1 to part 45 (#15).

[102] *See, e.g.,* 17 CFR 23.450.

[103] These proposed data elements are Notional quantity schedule—days of week (60), Notional quantity schedule—hours from thru (63), Notional quantity schedule -load profile type (66), USD equivalent regulatory notional amount (42), Notional quantity schedule—unadjusted effective date of days of week (61), Notional quantity schedule—unadjusted end date of days of week (62), Notional quantity schedule—unadjusted effective date of hours from thru (64), Notional quantity schedule—unadjusted end date of hours from thru (65), Notional quantity schedule -unadjusted effective date of load profile type (67), and Notional quantity schedule-unadjusted end date of load profile type (68). These proposed data elements will be added to appendix 1 of part 45.

[104] The proposed data element is USD equivalent regulatory notional amount (42).

[105] These proposed data elements are Option exercise end date (113), Option exercise frequency period (114), and Option exercise frequency period multiplier (115). These proposed data elements will be added to the Data Element Appendices.

[106] These proposed data elements are Swap pricing method (116), Pricing date schedule of the swap (117), and Start and end time of the settlement window for the floating leg(s) (118). These proposed data elements will be added to appendix 1 of part 45.

[107] These data elements are Physical commodity contract indicator (131) and Maturity date of the underlier (133).

part 45.[108] The proposed ''Pricing index location'' and ''Physical delivery location'' fields would allow the Commission to receive critical pricing and delivery location information in the case where the UPI is reported with an underlier of ''other'' or other instances where the pricing or delivery locations could not be derived from the Underlier ID. Proposed ''Physical commodity contract indicator'' provides critical information related to whether a swap in the other commodity asset class is related to or references one of the contracts in appendix B to part 43. This information is important to perform cross-market analysis and surveillance. The UPI Reference Data Library does not provide for the reporting of the product grade for swaps in the other commodity asset class. The proposed ''Product grade'' field would aid in the analysis of an entities' exposure, which can vary based on the grade of the commodity. Finally, the proposed ''Maturity date of the underlier'' field would provide information about the underlier that is relevant for swaption and swap products referencing exchange traded derivative products. This data element is expected to be implemented across jurisdictions.[109]

Transaction Related. The Commission is proposing to add two transaction-related data elements to the Data Element Appendices [110] and one additional transaction-related data element to appendix 1 to part 45.[111] These elements are intended to facilitate an SDR's ability to meet its regulatory obligations under parts 43 and 49 of the Commission's regulations. Commission regulation 43.5(d) requires an SDR to disseminate swap transaction and pricing data for transactions executed on or pursuant to the rules of a SEF or DCM subject to a specified time delay. The proposed ''SEF or DCM indicator'' data element would provide an SDR with information necessary to indicate when its obligations under Commission regulation 43.5(d) apply. In addition to dissemination delay requirements specifically related to SEFs and DCMs, § 43.5 generally sets out required time delays for block trades and large notional swap transactions. Proposed data element ''Large notional off-facility swap election indicator'' would provide an SDR with information necessary to indicate when a time delay is applicable to a large notional off-facility swap transaction. This proposed data element is analogous to the ''Block trade election indicator'' that is already included in the Data Element Appendices. Finally, the Commission is proposing to add the data element ''SEF or DCM anonymous execution indicator'' to provide SDRs with information necessary to comply with § 49.17(f)(2), which requires SDRs to make a swap transaction accessible to either counterparty to the swap. In providing this access, § 49.17(f)(2) requires an SDR to not identify one counterparty to another in instances where the swap is executed anonymously on a SEF or DCM and cleared in accordance with §§ 1.74, 23.610, and 39.12(b)(7) of the Commission's regulations. This proposed data element will provide an SDR with information that is necessary to satisfy the requirements of § 49.17(f)(2).

Request for Comment

The Commission invites comments on any of the data elements listed above; additionally, Commission staff invite separate comment on the draft Technical Specification 3.3 now published on the Commission website that is intended, upon finalization, to provide technical instructions on the acceptable form and manner for transmitting required data elements to an SDR. The Commission also requests specific comment on the following:

(1) Are there any data elements not included in the proposed Data Element Appendices that commenters believe are necessary to facilitate further standardization of reporting?

(2) For proposed data element #30 Counterparty 2 special entity, are there any impediments that reporting entities would experience in providing additional information related to special entities, such as whether counterparty 2 is a ''utility special entity''?

(3) For proposed data element #116 Swap pricing method, are there additional allowable values other than those published in the Technical Specification that reporting entities believe may be applicable for this data element?

(4) For proposed data element #42 USD equivalent regulatory notional amount, are there impediments that reporting entities would experience in calculating and reporting USD equivalent notional amount? The Commission also seeks comment on the cited calculation methodology and the utility of the notional values calculated according to the methodology.

The Commission requests comment on the following questions related to swap transactions that reference the delivery of power. Specifically, the Commission requests comments on any burden or obstacles for reporting entities in reporting data elements related to these questions.[112]

(5) *Days of week:* Are there scenarios where the ''Days of Week'' for delivery vary over the duration of a transaction that necessitates the reporting of multiple ''Days of Week'' occurrences for a single transaction? Alternatively, is the reporting of a single occurrence of ''Days of the Week'' sufficient, and can this value be derived from commonly known and available data related to the referenced hub?

(6) *Hours from Thru:* Are there scenarios where the ''Hours from Thru'' for delivery vary over the duration of a transaction that necessitates the reporting of multiple ''Hours from Thru'' occurrences for a single transaction? Alternatively, is the reporting of a single occurrence of ''Hours from Thru'' sufficient, and can this value be derived from commonly known and available data related to the referenced hub?

(7) *Load Profile Type:* Are there scenarios where the ''Load Profile Type'' (*e.g.,* Peak, Off-Peak) for delivery varies over the duration of a transaction that necessitates the reporting of multiple ''Load Profile Type'' occurrences for a single transaction? Alternatively, is the reporting of a single occurrence of ''Load Profile Type'' sufficient, and can this value be derived from commonly known and available data related to the referenced hub?

IV. Proposed Revisions to the Descriptions of Existing Data Elements in Appendix A to Part 43 and Appendix 1 to Part 45

The Commission is proposing several modifications to the existing field descriptions in the Data Element

[108] These proposed data elements are Physical delivery location (124), Pricing index location (125), and Product grade (132).

[109] *See, generally,* July 10, 2022 O.J. (L 262), available at *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1855&from=EN; See* Proposed Amendments to OSC Rule 91–507 Trade Repositories and Derivatives Data Reporting and Proposed Changes to OSC Companion Policy 91–507CP and Proposed Changes to OSC Companion Policy 91–506CP, R.R.O. 2022—45 (OSC) (highlighting field 37–39), available at *https://www.osc.ca/sites/default/files/2022-06/cp_20220609_91-507_trade-repositories-derivatives-data-reporting.pdf.*

[110] These proposed data elements are Large notional off-facility swap election indicator (140) and SEF or DCM indicator (146). These proposed data elements will be added to the Data Element Appendices.

[111] The proposed data element is SEF or DCM anonymous execution indicator (147). This proposed data element will be added to the Data Element Appendices.

[112] At least one other jurisdiction intends to collect data elements related to these questions. *See* July 10, 2022 O.J. (L 262) (Fields 121 Load Type; 122 Delivery interval start time; 123 Delivery interval end time; 124 Delivery start date; 125 Delivery end date; and 127 Days of the week).

Appendices. Some of these modifications are being proposed to harmonize the descriptions contained in the Data Element Appendices with the descriptions adopted at the international level by the Regulatory Oversight Committee and related subcommittees.[113] For example, ''Reporting timestamp'' in appendix 1 to part 45 is proposed to be modified to add ''as reported'' to the data element description so that it reads, ''Data and time of the submission of the report as reported to the trade repository'' to align the description with the CDE Technical Guidance.

In addition, the descriptions contained in the appendices would be revised to eliminate detail that describes the form and manner of reporting the data element.[114] The form and manner detail proposed to be removed from the Data Element Appendices would be incorporated in the Technical Specification 3.3. The Commission believes setting out the form and manner in one location, namely the Technical Specification, simplifies the requirements. Moreover, removing such form and manner detail from the Data Element Appendices would avoid inconsistent form and manner instructions in those appendices and the Technical Specification, in the case where such form and manner instruction is modified in a revised Technical Specification. For example, data element #56 ''Floating rate reset frequency multiplier'' represents the number of time units, as expressed by data element #55 ''Floating rate reset frequency period,'' that determines the frequency at which periodic payment dates for reset occur. In the Data Element Appendices, the description of data element #56 includes an example of a transaction with reset payments occurring every two months. The Data Element Appendices state that in such case data element #55 should be populated with ''MNTH'' and data element #56 should be populated with ''2.'' As another example, data element #77 ''Strike price currency/currency pair'' currently states, in part, that for foreign exchange (''FX'') options, the manner in which the field should be expressed is as unit currency/quoted currency. In the Commission's proposed modifications, these types of form and manner instructions would be removed from the Data Element Appendices and incorporated in the Technical Specification.

Similar to the proposed modifications above, the Commission is also proposing to remove the asset class references in the Data Element Appendices. The removal of the asset class information will provide more clarity to reporting entities as the Technical Specification contains more specific information related to asset classes. For example, currently the Data Element Appendices merely indicate, with a checkmark, whether a data element is applicable for a specific asset class. The Technical Specification, however, provides more specific information related to when a particular data element is applicable to a transaction. This specificity provides more information about when and how to report a certain data element. Eliminating the asset class reference from the appendices will avoid any confusion that the more generic indicator in the appendices may create when read in conjunction with the more specific information provided in the Technical Specification. This proposed modification would impact each of the data elements in the Data Element Appendices.

V. Compliance Date

The Commission understands that market participants would need sufficient time to adjust reporting systems to account for the proposed modifications to parts 43 and 45 of the Commission's regulations, including the reporting of additional data elements not currently required by parts 43 and 45. In order to provide market participants with sufficient time, the Commission is proposing that the compliance date for the rules proposed herein be 365 days following publication of a final rule in the **Federal Register**.

Request for Comment

The Commission requests comment on all aspects of the proposed compliance date. The Commission also requests specific comment on the following:

(8) Is the proposed compliance date of 365 days after publication of a final rule in the **Federal Register** an adequate amount of time for compliance with respect to the additional data elements in the Data Element Appendices? If not, please propose an alternative timeline and provide reasons supporting that alternative timeline.

VI. Related Matters

A. Cost-Benefit Considerations

1. Introduction

Section 15(a) of the CEA requires the Commission to ''consider the costs and benefits'' of its actions before promulgating a regulation or issuing certain orders under the CEA.[115] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

While, as discussed previously and further below, the Commission preliminarily believes the proposed amendments—measured relative to the baseline of status quo conditions—would create meaningful benefits for market participants and the public, it also recognizes that they likely would result in some incremental costs. The Commission has endeavored to enumerate material costs and benefits and, when reasonably feasible, assign a quantitative value to them. Where it is not reasonably feasible to quantify costs and benefits of the proposed amendments, those costs and benefits are discussed qualitatively.

This cost-benefit consideration proceeds by discussing the background; describing the status quo baseline; identifying and assessing costs and benefits attributable to proposed non-data element changes to part 43 and part 45; identifying and assessing costs and benefits attributable to the proposed expansion of the required data elements, separated into CDE and non-CDE data elements, the latter referred to as CFTC data elements;[116] and, assessing how the costs and benefits it has identified bear upon each CEA section 15(a) factors.

[113] The following existing data elements in appendix 1 to part 45 are proposed to be modified in this way, ''Action type'' (26); ''Event type'' (27); ''Event identifier'' (29); ''Event timestamp'' (30); ''Reporting timestamp'' (97); ''Delta'' (109); ''Valuation amount'' (110).

[114] Nearly all of the data elements in the Data Element Appendices contain such changes.

[115] 7 U.S.C. 19(a).

[116] The cost analysis in section VI. C., as required by the Paperwork Reduction Act (PRA), is consistent, but not identical to the costs discussed in this section because for purposes of the PRA, estimated burden costs are divided between parts 43 and 45, whereas in this section, the cost and benefits discussions are divided between CDE data elements and CFTC data elements. Because of these methodological differences, the estimated costs might not be the same, but the underlying assumptions are the same.

2. Background

As discussed above, the Commission has undertaken several rulemakings since 2012 related to real-time public reporting (part 43) and swap data reporting and recordkeeping (part 45). These rulemakings have common threads, including: the Commission's continued attention to uphold its CEA section 2(a)(13) obligations [117] and the Commission's continued progress toward harmonizing data element reporting across international jurisdictions as well as Commission registrants (of which use of a shared UPI and product classification system is a critical piece).[118]

In the current proposed rulemaking, the Commission builds upon these prior rulemakings by, among other things, seeking to amend: (i) § 43.4(c) to allow for geographic masking after the designation of the UPI for the other commodity asset classes (along with conforming language amendments to related provisions); (ii) § 45.7(b) to explicitly state the Commission's authority to condition orders it issues pursuant to the section, and to limit, suspend or withdraw the designation of a designated UPI service provider and classification system; and (iii) the Data Element Appendices consistent with international harmonization and to provide additional necessary information, address reporting quality issues and make non-substantive conforming changes.

Proposed Amendment to § 43.4(c).

Since 2012, the Commission's regulations have incorporated the concept of UPIs for purposes of both part 43 real-time public reporting and part 45 swap data reporting and recordkeeping.[119] In order to fully implement the use of UPIs in SDR swap data reporting and recordkeeping as well as real-time public reporting, two challenges must be addressed. First, at least one UPI service provider capable of providing Reporting Entities with product codes and operating a corresponding product classification system needed to exist, be deemed by the Commission to meet the requirements set out in § 45.7(a) and be designated under § 45.7(b) for use for swap data reporting and recordkeeping purposes.[120] Second, the Commission's regulations must ensure that CEA section 2(a)(13) anonymity requirements are satisfied for PRSTs—a necessity that remains operative upon the Commission's designation of a UPI service provider under § 45.7 and Reporting Entities' undertaking to report UPI product information data elements to SDRs for transactions subject to real-time reporting of PRST. Current § 43.4(c)(4) and appendix E reflect the Commission's rulemaking efforts up to the present in this regard.[121] Summarized through its cumulative rulemakings, the Commission has determined that with one exception—*i.e.,* off-facility swaps in the other commodity asset class for which the PRST is not referenced or not economically related to any of the ''Enumerated Physical Commodity Contracts and Other Contracts'' listed in appendix B to part 43—compliance with part 43's real-time reporting and public dissemination requirements is required given the relatively low risk of revealing counterparty identity, business transactions or market positions.[122] As to the certain other commodity asset class swap exception, § 43.4(c)(4)(iii) now mandates that SDRs publicly disseminate the geographic location detail in a top-coded (*i.e.,* masked) manner as provided in appendix E to part 43.[123]

By designating a UPI and product classification system for swaps in the credit, equity, foreign exchange, and interest rate asset classes, the UPI February 2023 UPI Order significantly advanced the Commission's progress towards fully implementing UPI data reporting. However, the Commission remains concerned that its current regulations fall short of what is necessary to address the eventuality of designating a UPI and product classification system under § 45.7 for swap contracts in the other commodity asset class. More specifically, SDRs could face an operational dilemma after the designation of a UPI code for other commodity asset class swaps because such designation would trigger the obligation under parts 43 and 45 that such UPI be included in each public dissemination and confidential swap report,[124] yet the UPI may reference data library elements that reveal key, unmasked geographic locations such as delivery points. In some circumstances, it may be impossible for them to meet their general § 43.4(a) obligation to provide real-time price transparency by publicly disseminating the data specified in appendix A that Reporting Entities submit to them for other commodity asset class transactions (*i.e.,* unmasked UPI data elements) without violating § 43.4(c)(4)(iii)'s requirement that publicly disseminated geographical information be masked in accordance with appendix E. Proposed § 43.4(c)(5) is intended to resolve this problem and allow for full UPI reporting implementation.

Proposed Amendment to § 45.7(b).

The Commission also proposes to amend § 45.7(b) to expressly state its authority to issue UPI designation orders subject to conditions and to amend, suspend, or withdraw any such designation order after appropriate notice and opportunity to respond.

Proposed Amendment to Data Element Appendices

This rulemaking also seeks to amend the Data Element Appendices by adding

[117] 7 U.S.C. 2(a)(13) (requiring, among other things, that the Commission promulgate rules that provide for real-time public availability of STAPD for uncleared swaps in a form and manner to enhance price discovery while maintaining the anonymity of business transactions and market positions of the counterparties as well as ensuring that transaction participants remain anonymous); see also, *e.g.,* 2012 RTR Final Rule, 77 FR at 1209 (''[T]he Commission is requiring real-time reporting that will enhance price discovery while ensuring the anonymity of the swap counterparties and the confidentiality of business transactions and market positions.'').

[118] *See, e.g.,* 2012 RTR Final Rule, 77 FR at 1212 (noting Commission work with prudential regulators to develop unique product identifiers for the industry); 2012 SDRR Final Rule, 77 FR at 2166 (adopting 17 CFR 45.7 providing that swaps be identified in recordkeeping and swap data reporting by means of a UPI and product classification system upon designation by the Commission of such an identifier and classification system for this purpose); 2020 SDRR Final Rule, 85 FR at 75540 (discussing expectation for UPI availability within two years and methods for interim reporting to SDRs until the Commission designates a UPI provider pursuant to 17 CFR 45.7).

[119] *See* 2012 RTR Final Rule, 77 CFR at 1212; 2012 SDRR Final Rule, 77 FR at 2165, 2166.

[120] 17 CFR 45.7. Paragraph (c)(2) of the current rule provides that prior to the Commission's designation of a UPI and product classification system, Reporting Entities are to use SDRs' internal product identification or description systems for their swap data reporting and recordkeeping. *Id.* 45.7(c)(2).

[121] 17 CFR 43.4(c)(4); *id.* part 43 appendix E; *see also* 2012 RTR Final Rule, 77 CFR at 1208–1212 (determining that all off-facility swaps in the other commodity asset class that did not fall under § 43.4(d)(4)(ii) would not be required to comply with the real-time reporting and public dissemination requirements under part 43 because of the increased likelihood that public dissemination of the underlying asset could disclose the identity, business transactions or market positions of a counterparty, until the adoption of special accommodations in a future Commission release to address these concerns); Block Trade Final Rule, 78 FR at 32910, 32938, 32941 (adding § 43.4(d)(4)(iii), which mandated that SDRs must publicly disseminate the details about the geographic location of the underlying assets of the other commodity swaps not described in § 43.4(d)(4)(ii) pursuant to the newly added appendix E to part 43, which allowed for top-coding various geographic regions); 2020 RTR Final Rule, 85 FR at 75439 (declining to adopt proposed revisions to the masking requirements); discussion in section I.C., above.

[122] *See* 2012 RTR Final Rule at 1209–1212.

[123] Block Trade Final Rule, 78 FR at 32910, 32938, 32941.

[124] 2012 SDRR Final Rule, 77 FR at 2166; 17 CFR 45.7(c)(1).

data elements, including product-related data elements it refrained from including in the 2020 Final Rules out of concern that they would become redundant with the implementation of the UPI.[125] Since the 2020 Final Rules, the Commission has identified product-level data elements important for effective market oversight, but that are not determinable through the UPI and associated data library. The proposed new data elements broadly fall into two categories: CDE fields and CFTC fields. The proposed CDE data elements will further harmonize reported swaps data across jurisdictions, and the proposed CFTC fields will improve the Commission's ability to oversee its registrants. With respect to the latter, for example, the current Commission regulations do not consider that certain power swaps have associated schedules specific to the delivery process or specific details of the underlying option exercise—a shortcoming that limits transparency into information that can be revelatory and important for oversight purposes.

3. Baseline

The Commission identifies and considers costs and benefits relative to a status quo baseline. In this case that baseline is defined by three components: (1) the Commission's existing requirements under its part 43, part 45 and part 49 regulations; (2) its February 2023 UPI Order; and (3) non-US jurisdictions' movement to implement harmonized swap data reporting regimes that incorporate a UPI and product classification system operated and maintained by a FSB-designated entity, *i.e.,* DSB, in the near future to the extent that they have not done so already.

Current regulations require Reporting Entities to report STAPD, along with swap creation and continuation data, to an SDR as information specified in the Data Element Appendices.[126] As discussed above, the Data Element Appendices currently include UPI data elements, some data elements that are internationally harmonized and included in the CDE Technical Guidance, and some data elements that are specific to the CFTC. SDRs are required to accept these defined data elements from the Reporting Entities and maintain systems to validate the swap data they receive.[127] If a swap is a PRST, an SDR generally must disseminate the data elements listed in appendix A to part 43 to the general public,[128] and, for certain other commodity swaps, must do so in the manner prescribed in appendix E to part 43 to geographically mask the underlying asset.[129] The February 2023 UPI Order requires Reporting Entities to use UPIs issued by DSB for swaps in the credit, equity, foreign exchange, and interest rate asset classes in all recordkeeping and swap data reporting pursuant to part 45 and to facilitate real-time public reporting as required by part 43.[130] Finally, the Commission's movement towards implementation of UPI usage in swap reporting, as reflected in its past rulemakings, the February 2023 UPI Order and these proposed amendments, is part of a larger global movement by international derivatives regulators, discussed in detail above, to adopt and implement harmonized global swap reporting around commonly accepted criteria, of which UPI is a key component.[131]

The Commission notes that this cost-benefit consideration is based on its understanding that the derivatives market regulated by the Commission functions internationally with: (1) transactions that involve U.S. entities occurring across different international jurisdictions; (2) some entities organized outside of the United States that are registered with the Commission; and (3) some entities that typically operate both within and outside the United States and that follow substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, that discussion of costs and benefits below refers to the effects of the proposed regulations on all relevant derivatives activity, whether based on their actual occurrence in the United States or on their connection with activities in, or effect on, U.S. commerce.

The Commission requests comment on the baseline outlined in this section, including any of its components and what, if any, additional factors that should be considered.

4. Proposed Non-Data Element Amendments to Part 43 and Part 45 Costs and Benefits

First, the proposed addition of § 43.4(c)(5) would require Reporting Entities to report a geographically masked UPI to SDRs once a UPI and product classification system has been designated under § 45.7. This proposed change would shift the responsibility to limit the geographic information that is publicly disseminated for certain swaps in the other commodity asset class from SDRs, as currently set out in § 43.4(c)(4), to Reporting Entities. The Commission expects that Reporting Entities will incur minimal costs to implement this proposed modification. The Commission understands that currently, in most instances, in order to facilitate the geographic masking now required in § 43.4(c)(4), Reporting Entities already submit underlier information that limits geographic information for those swaps described in § 43.4(c)(iii). In addition, the Commission believes that Reporting Parties are in the best position to determine, and currently do determine, whether a swap transaction meets the criteria set out in § 43.4(c)(iii). Furthermore, the Commission believes Reporting Entities have developed systems to send required data elements to an SDR that can accommodate reporting specific to part 43. With respect to the SDRs, if Reporting Entities report a UPI that limits the geographic information according to Appendix E to part 43 to an SDR, the SDR will be able to disseminate that UPI without incurring additional costs that would otherwise be required to appropriately mask the geographic information in the reported UPI. For these reasons, the Commission believes costs to Reporting Entities and SDRs will be minimal. The Commission expects market participants and the general public to benefit from this modification since it provides the necessary regulatory groundwork for the Commission to designate a UPI and product classification system in the other commodity asset class designed to assure the real-time public dissemination of those swaps occurs with the requisite anonymity protection. The use of UPI in the other commodity asset class would significantly increase data quality and standardization in the data that is publicly disseminated and

[125] Besides the UPI, the current list of data elements required pursuant to appendix 1 of part 45 includes four other product-related fields; two of these are also included in appendix A of part 43. In the 2020 SDRR Final Rule, the Commission noted that SDRS would continue to accept, and reporting counterparties would continue to report, the product-related data elements unique to each SDR until the Commission designated a UPI. *See* 85 FR at 75540; 17 CFR 45.7(c)(2).

[126] *See* 17 CFR 43.3(d)(1), 45.13(a)(1). The Commission assumes for purposes of this cost-benefit consideration that Reporting Entities report this data in the form and manner provided in the technical specification published by staff on its website (*see* 17 CFR 43.7(a)(1), 45.15(b)(1)). The current Technical Specification is Version 3.2 (as revised in March 2023), available at *https://www.cftc.gov/media/8261/Part43_45TechnicalSpecification03012023CLEAN/download*.

[127] *See* 17 CFR 49.10(a), (c)(1).

[128] *See* 17 CFR 43.4(a) and 17 CFR 49.15(b).

[129] *See* 17 CFR 43.4(c)(4)(iii); *id.* part 43 appendix A. SDRs are additionally required to retain the swap creation and continuation data and make it available to the Commission. *See* 17 CFR 49.17(c).

[130] Order Designating the Unique Product Identifier and Product Classification System to be Used in Recordkeeping and Swap Data Reporting, 88 FR 11790, 11791 (Feb. 24, 2023).

[131] *See* discussion at section I.B., above.

the part 45 swap data received by the Commission. The reporting of a UPI that limits the geographic detail would ensure that geographic masking is done in a consistent manner and help to eliminate reporting errors.

Second, further proposed modifications to part 43 include implementing conforming and technical changes to § 43.4(c) and appendix E in connection with the geographic masking requirement, as described in section II.B above. Preliminarily, the Commission does not anticipate any material costs or benefits resulting from this proposal.

Third, the Commission proposes modifications to § 45.7(b) to expressly articulate its authority to condition a designation of a UPI and product classification system and to limit, suspend or withdraw a designation order after appropriate notice and opportunity to respond. Preliminarily, the Commission does not anticipate any material costs or benefits resulting from this proposal.[132]

Request for Comments

The Commission requests comment on the above assessment of benefits and costs. Are there additional costs or benefits that the Commission should consider? Is there data or other information that the Commission should consider to assist its efforts to quantify costs and benefits? Is there an alternative approach to what the Commission is proposing that would be preferable on cost/benefit grounds and, if so, what is it and why would it be preferable? Commenters are encouraged to include both qualitative and quantitative assessments of these costs and/or benefits and to provide substantiating data, statistics, and any other supportive information for positions they may posit.

5. Additional Swap Data Elements Reported to the Commission and to Swap Data Repositories: Proposed CDE Data Elements [133]

Introduction

This section considers the costs and benefits of the nineteen new data elements that are currently included in the recommended list of CDE data elements. As previously discussed in the 2020 Final Rules, the Commission believes that new data elements selected from the CDE Technical Guidance will further improve the harmonization of SDR data across FSB-member jurisdictions.[134] And, as the Commission and regulators in other FSB-member jurisdictions define data elements reflecting the CDE Guidance, standardization across SDRs and TRs internationally will support data aggregation for the analysis of global systemic risk in swaps markets.[135]

These new data elements are related to four data categories: custom basket, prices, notional amount and quantities, and product. A subset of these new data elements (ten) are set to also become required under part 43 real-time swap transaction reporting.

There are five data elements in the custom basket category: [1] custom basket code, [2] basket constituent identifier, [3] basket constituent unit of measure, [4] basket constituent number of units, and [5] basket constituent identifier source. The Commission believes these fields are essential to capture the underlying products that determine the value of the swap. This category of swaps can be especially important to monitor risk and used to aggregate swaps that have similar risk and reward characteristics. The Commission expects Reporting Entities to have easy access to these details as they represent a key feature of the negotiated swap.

There are six data elements in the price category: [1] price schedule—unadjusted effective date of the price, [2] price schedule—unadjusted end date of the price, [3] price schedule—price, [4] strike price schedule—unadjusted effective date of the strike price, [4] strike price schedule—unadjusted end date of the strike price, and [6] strike price schedule—strike. All six data elements will be reported under part 43. The Commission is aware of many examples of equity and other commodity swaps that contain a well-defined price schedule, which determines the risk/reward profile of the swap. Similarly, swaptions can be structured to have strike prices that change over the life of the swap according to a well-defined schedule determined at the time of trade. By adding the strike price schedule data elements, Commission staff would be able to determine if the change was due to an error or part of the normal lifecycle of the swap.

There are five data elements in the product category: [1] underlier ID (other), [2] underlier ID (other) source, [3] underlying asset price source, [4] underlying asset trading platform identifier, and [5] crypto asset underlying indicator. Only the last data element here (crypto asset underlying indicator) will be reported under part 43. The Commission believes the first two data elements are now necessary following the introduction of the UPI. As Reporting Entities send information about the underlier to the UPI provider, it is possible that the information will be new and not on a pre-defined list of underliers maintained by the UPI provider, in which case the provided UPI will simply note the underlier of ''other.'' Requiring Reporting Entities to submit this information would ensure it is retained and sent to the SDR. This will allow for updates to the reference list of underliers maintained by the UPI provider and will allow the Commission to identify the necessary information to understand the swap. The Commission expects the underlying asset price source field will be necessary to monitor possible manipulation attempts of benchmarks, for example from an oil price reporting agency or index publisher. The Commission is aware that equity and other commodity swaps might trade on a foreign trading venue and thus the new underlying asset trading platform identifier is required to note if the swap is valued in a non-US currency. Finally, considering the increase in trading in cryptocurrency derivatives, the Commission believes that receiving additional information with respect to cryptocurrency swap transactions will assist with identification of swaps that reference a cryptocurrency asset as the underlier.

There are three data elements in the notional amounts and quantities category: [1] notional quantity

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[132] The Commission recognizes that limiting, suspending or withdrawing a designation order potentially could pose costs to an impacted designee if the Commission were to have cause to exercise this expressly-stated amended § 45.7(b) authority. The Commission, consistent with its obligations under CEA section 15(a) and the Administrative Procedure Act, would consider any such potential costs, along with potential benefits, at the time of deciding whether to exercise its authority in any particular case. 7 U.S.C. 19(a); 5 U.S.C. 706.

[133] Besides the proposed data element additions considered in this section and section 6 below, the proposed rulemaking also includes several non-substantive changes to the Data Element Appendices. Specifically, the Commission proposes to remove language setting out the form and manner for reporting specific data elements from the Data Element Appendices, as that language is generally duplicative of the technical specifications published separately for the purpose of addressing the form and manner for reporting. The Commission preliminarily foresees no significant costs or benefits attendant to these non-substantive changes.

[134] *See, e.g.,* Final Rule, Swap Data Reporting and Recordkeeping, 85 FR 75503, 75539–40 (Nov. 25, 2020) (''As a general matter, the Commission believes the implementation of the CDE Technical Guidance will further improve the harmonization of SDR data across FSB jurisdictions.'').

[135] *See, e.g.,* Final Rule, Swap Data Reporting and Recordkeeping, 85 FR 75540 (Nov. 25, 2020) (''This harmonization, when widely implemented, would also allow the Commission to potentially receive more standardized information regarding swaps reported to TRs regulated by other authorities. For instance, such standardization across SDRs and TRs could support data aggregation for the analysis of global systemic risk in swaps markets.'').

schedule—unadjusted date on which the associated notional quantity becomes effective, [2] notional quantity schedule—unadjusted end date of the notional quantity, and [3] notional quantity schedule—notional quantity. All three data elements will be reported under part 43. These fields are similar to existing data elements in the Data Element Appendices, but with a key difference. That key difference is that the proposed fields point to ''non-monetary amounts.'' The new fields are being proposed to capture swaps in the other commodity asset class, which specify, for example, a quantity of oil or wheat. The Commission believes these new fields are essential to capture details of the swap not captured by the UPI or other currently required fields.

Benefits

The Commission believes including certain CDE Technical Guidance 3.0 data elements will create significant efficiencies for the Commission and Reporting Entities. By including certain CDE fields, the Commission believes it will receive more cohesive, more standardized, and, ultimately, more accurate data without sacrificing the ability to oversee the markets robustly. Higher-quality swap data will improve the Commission's oversight capabilities of registrants, and, in turn, will aid in protecting markets, participants, and the public in general.

The Commission proposes adding CDE fields related to custom baskets because it believes that the visibility and reporting accuracy of holdings in custom baskets provides critical information required to ensure robust oversight of registrants. The proposed additional fields related to product are necessary to understand the characteristics of the non-standard underliers across asset classes at a level of granularity not provided in the UPI Taxonomy. A more complete identification of certain underliers will allow the Commission to distinguish between positions in different contracts that may not currently be distinguishable, allowing better oversight of registrants and thereby protecting the financial integrity of the swaps market. Moreover, receiving information specifying the underlying asset price source is critical to the Commission's benchmark manipulation surveillance efforts, thereby enhancing the protections afforded to the markets generally.

Since some of these proposed CDE data elements will be publicly disseminated pursuant to part 43, the Commission believes this proposal will provide additional swap market transparency to market participants and to the general public. For example, the Commission is aware of swaps that contain price and/or notional amounts that vary according to a defined schedule. Certain aspects of these defined schedules are not currently disseminated on the real-time ticker. The proposed fields address this problem and will allow for more accurate and complete information, thereby allowing market participants to better analyze STAPD.

The Commission believes that proposing additional CDE fields will benefit cross-jurisdictional Reporting Entities by reducing compliance and reporting costs. As standards are adopted across various jurisdictions, these Reporting Entities can develop a single reporting system that can send the standardized information regardless of data reporting requirements.

The Commission believes adding these CDE data elements will provide access to high-quality swap data that is essential for the public, and for regulators to monitor the swaps market for systemic risk or unusually large concentrations of risk in individual swaps markets or asset classes, thereby promoting financial integrity.

Costs

The Commission believes that because all the new data elements represent important price-forming details of the swap they should readily be available to reporters in the normal course of business. For example, schedules capturing changes in price and strike price or specific details of the underlier along with knowledge of the custom basket constituents are key aspects of a swap. Based on this belief, the Commission expects data access and transmission costs to be minimal since reporting entities have immediate access to the new information and the ability to use current systems and processes to send it to the SDR.

The Commission does acknowledge that the proposed changes could result in some costs to SDRs and Reporting Entities to modify their electronic systems to accommodate the new data elements; to the extent any SDRs and Reporting Entities are already in the process of (or have completed) modifying their electronic systems to accommodate the new data elements for reporting in other jurisdictions, their costs will likely be lower since a fixed component of the infrastructure costs for such modifications may have already been incurred. The Commission, however, does not have access to data to indicate the degree to which SDRs and Reporting Entities have undertaken these modifications already; accordingly, its cost estimates represent the upper limit, with the likely actual costs being lower. These cost burdens are hourly rate for a mix of computer programmer, compliance officer, and lawyer professionals.[136] The Commission estimates the cost burden for SDRs to be $18,195 to $36,391.[137] The Commission estimates the cost burden for Reporting Entities to be $3,639 to $7,278.[138]

Request for Comments

The Commission requests comment on the above assessment of benefits and costs, including on the identified benefits for SDRs, Reporting Entities, market participants and the public generally; and on the range of costs and the estimates of cost burdens to SDRs and Reporting Entities to comply with the proposed amendments related to the addition of the new CDE data elements. Are there additional costs or benefits that the Commission should consider? Is there data or other information that the Commission should consider to assist its efforts to quantify costs and benefits (including improved efficiency) and/or to understand the degree to which SDRs

[136] Commission staff arrived at an hourly rate of $93.31 using figures from a weighted average of salaries and bonuses across different professionals contained in the most recent BLS Occupation Employment and Wages Report (May 2022) multiplied by 1.3 to account for overhead and other benefits. The Commission estimated wage rate is a weighted national average of mean hourly wages for the following occupations (and their relative weight): ''computer programmer—industry: securities, commodity contracts, and other financial investment and related activities'' (50% weight); ''compliance officer—industry: securities, commodity contracts, and other financial investment and related activities'' (25% weight); and ''lawyer- industry: securities, commodity contracts, and other financial investment and related activities'' (25% weight). Commission staff chose this methodology to account for the variance in skill sets that may be used to accomplish the collection of information.

[137] This estimate incorporates the hourly rate of $93.31 as discussed above. For the purpose of considering the cost burden to SDRs, the Commission estimates a lower and upper bound for the number of hours required to adjust current electronic systems to send and/or receive swaps data, along with necessary requirements to validate data. For SDRs, the Commission expects a range of 500 to 1,000 hours. The CDE data elements represent 39 percent of the proposed additional data elements, so the range of expected hours for SDRs for the CDE data elements is 195 to 390 hours.

[138] This estimate incorporates the hourly rate of $93.31 as discussed above. For the purpose of considering the cost burden to Reporting Entities, the Commission estimates a lower and upper bound for the number of hours required to adjust current electronic systems to send and/or receive swaps data, along with necessary requirements to validate data. For Reporting Entities, the Commission expects a range of 100 to 200 hours. The CDE data elements represent 39 percent of the proposed additional data elements, so the range of expected hours for Reporting Entities for the CDE data elements is 39 to 78 hours.

and Reporting Entities have already modified their electronic systems to accommodate the new data elements, or are in the process of doing so? Are there alternatives to what the Commission is proposing that would be preferable on cost/benefit grounds and, if so, what are they and why would they be preferable? Commenters are encouraged to include both qualitative and quantitative assessments of these costs and/or benefits and to provide substantiating data, statistics, and any other supportive information for positions they may posit.

6. Additional Swap Data Elements Reported to the Commission and To Swap Data Repositories: Proposed CFTC Data Elements

Introduction

This section considers the costs and benefits of the thirty new data elements that are not included in the recommended list of CDE data elements. These new data elements can be broken into six data categories: prices, product, notional amount and quantities, clearing, counterparty, and transaction. A subset of these new data elements (eight) are set to also become required under part 43 real-time swap transaction reporting. We consider these CFTC new data elements separately from the CDE new data elements discussed above due to the differences that arise in both the costs and the benefits.

There are six data elements in the prices category: [1] option exercise end date, [2] option exercise frequency period, [3] option exercise frequency period multiplier, [4] swap pricing method, [5] pricing date schedule of the swap, and [6] start and end time of the settlement window for the floating leg(s). Three of these fields (related to option exercise) are reported also under part 43. The Commission expects a primary use-case for these data elements will focus on analysis of important swap-level characteristics that determine the payoffs—specifically noting important exercise and settlement details that will not be captured by the UPI. These details are essential for the Commission to monitor and identify potential cases of market manipulation. The Commission believes these details should be well known to both sides of the swap and be easy to report to the SDR.

There are five data elements in the product category: [1] physical delivery location, [2] pricing index location, [3] physical commodity contract indicator, [4] product grade, and [5] maturity date of the underlier. Two of these fields are reported also under part 43. Except for the last new data element, maturity date of the underlier, all the data elements here in the product category apply only to the other commodity asset class. As previously discussed, prior part 43 and part 45 rulemakings included minimal non-UPI product-related data elements, and the Commission believes the addition of these five data elements will provide it with information essential to understanding the price and risk of swaps in the other commodity asset class that the UPI alone will not capture.

There are 10 data elements in the notional amounts and quantities category, and 9 of these proposed schedule-related fields concern the delivery of power, which can be divided into four data elements related to the following three groups: [1] days of the week, [2] hours from thru, and [3] load profile type. The Commission understands that this delivery information, which is necessary to fully understand the economics of swaps for the delivery of power, will not be captured by UPIs. Further, the Commission believes this information should be readily available to both sides of the swap transaction. The remaining element is USD equivalent regulatory notional amount, which will allow for standardized and consistent reporting of notional amount and will be used to aggregate and monitor swaps market activity.

There are two data elements in the clearing category: [1] mandatory clearing indicator, and [2] clearing member identifier source. One of these fields is reported also under part 43.

There are four data elements in the counterparty category: [1] counterparty 1 identifier source, [2] counterparty 1 designation, [3] counterparty 2 designation, [4] counterparty 2 special entity. Counterparty 1 identifier source is very similar to a currently required data element for counterparty 2 and is now being added to address the introduction of certain swaps that trade without a required swap dealer or LEI. Counterparty designation fields are necessary to distinguish dealers from non-dealers. Counterparty 2 special entity will be used for identifying reporting thresholds and exemptions.

There are three data elements in the transaction category: [1] SEF or DCM anonymous execution indicator, [2] large notional off-facility swap election indicator, and [3] SEF or DCM indicator. Two fields are reported under part 43. The Commission preliminarily believes that these fields are currently being reported to the SDRs and they are required for the SDR to perform its required responsibilities. The Commission expects this information is available to the Reporting Entities who also have systems in place to send this information to the SDRs.

Benefits

Similar to the 2020 Final Rules in which the Commission first adopted some CFTC-specific data elements, the Commission believes expanding the number of CFTC data elements is necessary to support the Commission's regulatory responsibilities. The expanded set of CFTC data elements will assist the Commission's efforts to investigate potential violations of the CEA and the CFTC regulations. For example, the product fields will be used to investigate price manipulation and disruptive trading practices, which provides benefits to market participants and the general public who could otherwise fall victim.

Further, the Commission expects the new CFTC data elements in this proposed rulemaking will benefit market participants and the general public by increasing transparency. Eight of these data elements will become part of the real-time ticker established under part 43 of the CFTC regulations.[139] The Commission believes the expanded public information increases the value of the post-trade public dissemination. The general public benefits with the increased transparency as the information can be used to generate reports that increase knowledge related to trade activity. This information is also included in the expanded set of regulatory data required under part 45, which further benefits market participants and the general public by allowing Commission staff to incorporate publicly accessible data into its market oversight and compliance responsibilities.

The Commission believes that the new CFTC data elements will benefit SDRs by providing them with required information to comply more easily with Commission regulations. For example, the 'mandatory clearing indicator' represents information that should be known to the Reporting Entity but might be uncertain to the SDR, which requires precise information to comply with required time delays pursuant to § 43.5.

Costs

As discussed above regarding the proposed CDE data elements, the Commission believes the cost burden to SDRs and Reporting Entities will likely be limited to the costs required to modify and expand existing electronic systems and databases to accommodate the new CFTC data elements. While the

[139] *See* 17 CFR part 43.

subset of proposed data elements considered here are not considered CDE, the Commission expects the majority are essential price-forming details of the swap and should be readily available to the Reporting Entity to send to an SDR without incurring significant costs.

Using the same methodology employed, above, to estimate costs related to proposed CDE data elements, the Commission estimates the costs to SDRs and Reporting Entities associated with the need to modify their electronic systems to accommodate the new proposed CFTC data elements to be as follows: SDRs—$28,460 to $56,919; [140] Reporting Entities—$5,692 to $11,384.[141]

Request for Comments

The Commission requests comment on the above assessment of benefits and costs, including on the identified benefits for SDRs, market participants and the public generally; and on the range of costs and the estimates of cost burdens to SDRs and Reporting Entities to comply with the proposed amendments related to the addition of the new CFTC data elements. Are there additional costs or benefits that the Commission should consider? Is there data or other information that the Commission should consider to assist its efforts to quantify costs and benefits? Are there alternatives to what the Commission is proposing that would be preferable on cost/benefit grounds and, if so, what are they and why would they be preferable? Commenters are encouraged to include both qualitative and quantitative assessments of these costs and/or benefits and to provide substantiating data, statistics, and any other supportive information for positions they may posit.

7. Section 15(a) Considerations

Factor 1: Protection of Market Participants and the Public

The Commission believes the proposed changes will enhance protections already in place for market participants and the public. By adding new data elements, the Commission believes it will receive more cohesive, more standardized, and, ultimately, more accurate data without sacrificing the ability to oversee the markets robustly. Higher-quality swap data will improve the Commission's oversight capabilities, and, in turn, will aid it in protecting markets, market participants, and the public in general. The Commission views this benefit, in combination with the others it recognizes, to warrant the relatively minor expected costs that it has identified.

Factor 2: Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission believes that the proposed amendments may potentially have a beneficial effect for the financial integrity of the swap markets because the proposed amendments would assist the Commission in its supervision of registrants and oversight of the derivatives markets. More complete and more accurate publicly disseminated swap transactions data may improve market efficiency and competitiveness by helping the public make better informed decisions. Moreover, as discussed above, the Commission believes that adding certain CDE fields will benefit cross-jurisdictional Reporting Entities by reducing compliance and reporting costs, and the Commission believes that in some instances the new proposed CFTC data elements will benefit SDRs by providing them with information that can be used to comply with the Commission's regulations. Again, the Commission views this benefit, in combination with the others it recognizes, to warrant the relatively minor expected costs that it has identified.

Factor 3: Price Discovery

Section 2(a)(13) of the CEA and the Commission's existing regulations in part 43 implementing CEA section 2(a)(13) require STAPD to be made available to the public in real time. The Commission believes inaccurate and incomplete STAPD hinders the use of the STAPD, which harms transparency and price discovery. The Commission expects market participants will be better able to analyze STAPD as a result of the additional publicly disseminated data elements, because the fields will make STAPD more accurate and complete. The Commission views this benefit, in combination with the others it recognizes, to warrant the relatively minor expected costs that it has identified.

Factor 4: Sound Risk Management Practices

The Commission believes the proposed rules will improve the quality of swap data reported to SDRs and, hence, improve the Commission's ability to monitor the swaps market, react to changes in market conditions, and fulfill its regulatory responsibilities generally. The Commission believes regulator access to high-quality swap data is essential for regulators to monitor the swaps market for systemic risk or unusually large concentrations of risk in individual swaps markets or asset classes. The Commission views this benefit, in combination with the others it recognizes, to warrant the relatively minor expected costs that it has identified.

Factor 5: Other Public Interest Considerations

The Commission believes the improved accuracy resulting from improvements to data entry by market participants via the proposed rules has other beneficial public interest impacts including: [1] Increased understanding for the public, market participants, and the Commission of the interaction between the swaps market, other financial markets, and the overall economy; [2] Improved regulatory oversight and enforcement capabilities; and [3] Enhanced information for the Commission and other regulators so that they may establish more effective public policies to monitor and, where necessary, reduce overall systemic risk. The Commission views these benefits, in combination with the others it recognizes, to warrant the relatively minor expected costs that it has identified.

General Request for Comments

The Commission generally requests comments on all aspects of its consideration of costs and benefits, including the identification and assessment of any costs and benefits not discussed herein; data and any other information to assist or otherwise inform the Commission's ability to quantify or qualitatively describe the costs and benefits of the proposed amendments; and substantiating data, statistics, and any other information to support positions posited by commenters with respect to the Commission's discussion. The Commission welcomes comment on such costs and benefits, particularly from existing Reporting Entities and SDRs that can provide quantitative cost and benefit data based on their respective experiences. The

[140] This estimate incorporates the hourly rate of $93.31 as discussed above. The Commission expects the SDRs will be required to spend 500 to 1,000 hours to update systems to accommodate the new data elements. The CFTC data elements represent 61 percent of the proposed additional data elements, so the range of expected hours for SDRs for the CFTC data elements is 305 to 610 hours.

[141] This estimate incorporates the hourly rate of $93.31 as discussed above. The Commission expects the Reporting Entities will be required to spend 100 to 200 hours to update systems to accommodate the new data elements. The CFTC data elements represent 61 percent of the proposed additional data elements, so the range of expected hours for Reporting Entities for the CFTC data elements is 61 to 122 hours.

Commission also welcomes comments on alternatives to the proposed amendments that may be preferable on cost-benefit grounds and why.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act [142] (''RFA'') requires that agencies, in proposing rules, consider the impact of those rules on ''small entities.'' [143] The Commission has defined ''small entities'' as used by the Commission in evaluating the impact of its rules in accordance with the RFA.[144] The amendments to part 43 and part 45 proposed herein would have a direct effect on the operations of DCMs, DCOs, MSPs, PBs,[145] SDs, RCPs, SEFs, and SDRs. The Commission has previously certified that DCMs,[146] DCOs, [147] MSPs,[148] SDs,[149] SEFs,[150] and SDRs [151] are not small entities for RFA purposes.

The proposed amendments to part 43 and part 45 would have a direct impact on all RCPs. These RCPs may include SDs, MSPs, DCOs, and non-SD/MSP/DCO counterparties. Regarding whether non-SD/MSP/DCO reporting counterparties are small entities for RFA purposes, the Commission notes that section 2(e) of the CEA prohibits a person from entering into a swap unless the person is an eligible contract participant (''ECP''), except for swaps executed on or pursuant to the rules of a DCM.[152] The Commission has previously certified that ECPs are not small entities for purposes of the RFA.[153]

The Commission has analyzed swap data reported to each SDR [154] across all five asset classes to determine the number and identities of non-SD/MSP/DCOs that are reporting counterparties to swaps under the Commission's jurisdiction. A recent Commission staff review of swap data, including swaps executed on or pursuant to the rules of a DCM, identified nearly 1,600 non-SD/MSP/DCO reporting counterparties.

Based on its review of publicly available data, the Commission believes that the overwhelming majority of these non-SD/MSP/DCO reporting counterparties that have reporting obligations under parts 43 and 45 are either ECPs or do not meet the definition of ''small entity'' established in the RFA. Accordingly, the Commission does not believe the Final Rule will affect a substantial number of small entities.

Based on the above analysis, the Commission does not believe that this proposal will have a significant economic impact on a substantial number of small entities. Thus, under section 3(a) of the RFA,[155] the Chairman, on behalf of the Commission, certifies that the proposed rules will not have a significant economic impact on a substantial number of small entities. The Commission nonetheless invites comment from any entity which believes that these rules would have a significant economic impact on its operations.

C. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') [156] imposes certain requirements on Federal agencies, including the Commission, in connection with agencies' conducting or sponsoring any collection of information, as defined by the PRA. This proposed rulemaking would result in the collection of information within the meaning of the PRA. The Commission has previously received control numbers from the Office of Management and Budget (''OMB'') for each of the collections impacted by this rulemaking: OMB Control Numbers 3038–0070 (relating to part 43 Real-Time Public Reporting) and 3038–0096 (relating to part 45 Swap Data Recordkeeping and Reporting Requirements).

The Commission is proposing to amend the above information collections to accommodate newly proposed and revised information collection requirements for participants in the swaps markets that require approval from OMB under the PRA. The amendments are expected to modify the existing annual burden for complying with certain requirements of parts 43 and 45. Specifically, the Commission is proposing to amend regulation 43.4(c) to incorporate the UPI and product classification system for the other commodity asset class and amending appendix A to part 43 and appendix 1 to part 45 to add additional data elements to be reported by Reporting Entities.

Until the Commission designates a UPI and product classification system for the other commodity asset class, Reporting Entities will use the internal product identifiers or product descriptions used by the SDR for the reporting of swaps in the other commodity asset class. As a result, until the Commission designates a UPI for the other commodity asset class, the burden estimates for the product fields are already accounted for in the current burden estimates for §§ 45.3 and 45.4. To avoid double-counting, the Commission is not revising the burden estimate for the implementation of a UPI and product classification system for the other commodity asset class until the Commission designates a UPI.

The Commission also proposes to amend appendix A to part 43 and appendix 1 to part 45 to require the reporting and public dissemination of certain additional details regarding swap transactions. Appendix A to part 43 describes the fields for which an SDR must publicly disseminate swap transaction and pricing data, and appendix 1 to part 45 lists the swap data elements required to be reported to SDRs. The Commission is proposing to add nineteen data elements from the CDE Technical Guidance 3.0 (of which ten are required to be publicly disseminated) and thirty data elements not included in the CDE Technical Guidance 3.0 (of which eight are required to be publicly disseminated) to the Data Element Appendices. The reporting of these additional data elements will affect the burden estimates for part 43 (Real-Time Public Reporting) and part 45 (Swap Data Recordkeeping and Reporting Requirements).[157]

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[142] 5 U.S.C. 601 *et seq.*

[143] *See* 5 U.S.C. 603. The RFA applies to rules subject to notice and comment rulemakings issued pursuant to section 553(b) of the Administrative Procedure Act, 5 U.S.C. 553(b), or any other law. *Id.*

[144] *See* Policy Statement and Final Establishment of Definitions, 47 FR 18618 (Apr. 30, 1982).

[145] The Commission understands that all prime brokers (''PBs'') currently acting as such in connection with swaps are SDs. Consequently, the RFA analysis applicable to SDs applies equally to PBs.

[146] *See* 1982 RFA Release.

[147] The Commission has previously certified that DCOs are not small entities for purposes of the RFA. *See* DCO General Provisions and Core Principles, 76 FR 69334, 69428 (Nov. 8, 2011).

[148] *See* SD and MSP Recordkeeping, Reporting, and Duties Rules, 77 FR 20128, 20194 (Apr. 3, 2012) (basing determination in part on minimum capital requirements).

[149] *See id.*

[150] *See* Core Principles and Other Requirements for SEFs, 78 FR 33476, 33548 (June 4, 2013).

[151] *See* Swap Data Repositories, 75 FR 80898, 80926 (Dec. 23, 2010) (basing determination in part on the central role of SDRs in swaps reporting regime, and on the financial resource obligations imposed on SDRs).

[152] *See* 7 U.S.C. 2(e).

[153] *See* 2020 RTR Final Rule, 85 FR at 75461.

[154] The sample data sets varied across SDRs and asset classes based on relative trade volumes. The sample represents data available to the Commission for swaps executed over a period of one month. These sample data sets captured 2,551,907 FX swaps, 603,864 equity swaps, 357,851 other commodity swaps, 276,052 IRS, and 98,145 CDS.

[155] 5 U.S.C. 605(b).

[156] 44 U.S.C. 3501 *et seq.*

[157] As discussed above in the Cost-Benefit Considerations section, the following cost burden

The Commission is therefore submitting this proposal to the OMB for its review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. Responses to this collection of information by reporting firms pursuant to the parts 43 and 45 regulations would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act [158] and 17 CFR part 145, ''Commission Records and Information.'' In addition, CEA section 8(a)(1) strictly prohibits the Commission, unless specifically authorized by the CEA, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [159] The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[160]

1. Part 43: Revisions to Collection 3038–0070 (Real-Time Public Reporting)

Regulation 43.3 requires reporting counterparties, SEFs, and DCMs to send swap transaction and pricing data as described in appendix A of part 43 to SDRs as soon as technologically practicable after execution. Regulation 43.4 requires SDRs to publicly disseminate the swap transaction and pricing data described in appendix A of part 43. The Commission estimates that the highly automated nature of part 43 reporting virtually eliminates the marginal costs associated with the ongoing recordkeeping or reporting burden for each proposed additional data element to appendix A of part 43. Rather, the costs for the proposed amendments will mostly be incurred to develop, modify, and test existing processes to capture and transmit the proposed additional data elements. Accordingly, the Commission is retaining its previous estimated numbers of reports, burden hours per report, and average burden hour cost under §§ 43.3 and 43.4. However, the Commission does estimate Reporting Entities will incur the following costs to implement the additional new data fields.

Under § 43.3, the Commission estimates that the cost for a Reporting Entity, which includes DCMs, DCOs, SDs, MSPs, non-SD/MSP/DCOs, and SEFs, to modify their systems and to adopt the proposed addition of data elements to appendix A to part 43 could range from $3,000–$6,000, assuming it takes each Reporting Entity an estimated total of 33–67 hours to perform the necessary tasks. There are an estimated 1,729 Reporting Entities. Since the Commission cannot enter a range of estimates, the Commission has averaged its estimates of $3,000 to $6,000 as $4,500 for the 1,729 reporting entities, for a total of $7,780,500 ($4,500 * 1,729 reporting entities). Based on five-year, straight line depreciation, this amounts to annualized total capital/start-up costs for all covered entities of $1,556,100 ($7,780,500/5). The estimated cost is based on a number of assumptions that cover tasks required to design, test, and implement an updated data system based on the new swap data elements contained in part 43.

Under § 43.4, the Commission estimates that the cost for an SDR to modify their systems, including their data reporting, ingestion, and validation systems, and maintain those modifications going forward may range from $16,000–$31,000 per SDR, assuming it takes each Reporting Entity an estimated total of 170–330 hours to perform the necessary tasks. There are currently three SDRs. Since the Commission cannot enter a range of estimates, the Commission has averaged its estimates of $16,000–$31,000 as $23,500 for the three SDRs, for a total of $70,500 ($23,500 * 3 reporting entities). Based on five-year, straight line depreciation, this amounts to annualized total capital/start-up costs for all covered entities of $14,100 ($70,500/5). The estimated cost range is based on assumptions that cover the set of tasks required for the SDR to design, test, and implement a data system based on the list of swap data elements contained in part 43.

2. Part 45: Revisions to Collection 3038–0096 (Swap Data Recordkeeping and Reporting Requirements)

Under §§ 45.3 and 45.4, SEFs, DCMs, and reporting counterparties must report swap creation data and swap continuation data as described in the data elements in appendix 1 to part 45 and in the form and manner provided in the technical specification published by the Commission under § 45.15.[161] SDRs are required to accept the data elements from the Reporting Entities and maintain systems to validate swap data.[162] Similar to the discussion above in connection with the burden estimates for part 43, the Commission estimates that the highly automated nature of part 45 reporting virtually eliminates the marginal costs associated with the ongoing reporting or recordkeeping burden for each proposed additional data element to appendix 1 of part 45. Rather, the costs for the proposed amendments will primarily be incurred to develop, modify, and test existing processes to capture and transmit the proposed additional data elements. Accordingly, the Commission is retaining its previous estimated numbers of reports, burden hours per report, and average burden hour costs for reporting and recordkeeping under §§ 45.3 and 45.4. However, the Commission does expect Reporting Entities to incur the following capital/start-up costs under § 45.3 to implement the additional new data fields.[163]

The Commission estimates that the cost for a Reporting Entity to modify their systems to adopt the proposed addition of data elements to appendix 1 of part 45 could range from $37,000–$75,000, assuming an estimated total of 400–800 hours per reporting to perform the necessary tasks. There are an estimated 1,732 Reporting Entities. Since the Commission cannot enter a range of estimates, the Commission has averaged its estimates of $37,000–$75,000 as $56,000 for the 1,732 Reporting Entities, for a total of $96,992,000 ($56,000 * 1,732 reporting entities). Based on five-year, straight line depreciation, this amounts to annualized total capital/start-up costs for all covered entities of $19,398,400 ($96,992,000/5). The estimated cost range is based on a number of assumptions that cover tasks required to design, test, and implement an updated data system based on the new swap data elements contained in part 45.

Request for Comment

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements

estimations are based on an estimated hourly rate for a mix of computer programmer, compliance officer, and lawyer professionals. Commission staff arrived at an hourly rate of $93.31 using figures from a weighted average of salaries and bonuses contained in the most recent BLS Occupation Employment and Wages Report (May 2022) multiplied by 1.3 to account for overhead and other benefits.

[158] 5 U.S.C. 552.

[159] 7 U.S.C. 12(a)(1).

[160] 5 U.S.C. 552a.

[161] *See* 17 CFR 45.3, 45.4, and 45.15.

[162] *See* 17 CFR 45.4(b), 49.10.

[163] The Commission included the estimated capital/start-up costs associated with modification of systems to implement the additional new data fields in appendix 1 to part 45 under § 45.3. To avoid double counting, these estimates also cover any capital/start-up costs under § 45.4 for a Reporting Entity to modify its systems to implement the proposed addition of data elements to appendix 1. As noted above, the Commission is soliciting comments on the revised burden estimates for part 45, including the estimated costs related to the modification or maintenance of systems in order to comply with the proposed amendments.

discussed above. The Commission will consider public comments on this proposed collection of information in:

(1) Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

(2) Evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;

(3) Enhancing the quality, utility, and clarity of the information proposed to be collected; and

(4) Minimizing the burden of the proposed information collection requirements on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.,* permitting electronic submission of responses.

Copies of the submission from the Commission to OMB are available from the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, (202) 418–5714 or from *https://RegInfo.gov.* Organizations and individuals desiring to submit comments on the proposed information collection requirements should send those comments to:

- The Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Desk Officer of the Commodity Futures Trading Commission;
- (202) 395–6566 (fax); or
- *OIRAsubmissions@omb.eop.gov* (email).

Please provide the Commission with a copy of submitted comments so that comments can be summarized and addressed in the final rulemaking, and please refer to the **ADDRESSES** section of this rulemaking for instructions on submitting comments to the Commission. OMB is required to make a decision concerning the proposed information collection requirements between 30 and 60 days after publication of this release in the **Federal Register**. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 calendar days of publication of this release. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

D. Antitrust Considerations

CEA section 15(b) requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the CEA in issuing any order or adopting any Commission rule or regulation.[164]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the proposed rules implicate any other specific public interest to be protected by the antitrust laws.

The Commission has considered the proposed rules to determine whether they are anticompetitive and has preliminarily identified no anti-competitive effects. The Commission requests comment on whether the proposed rules are anticompetitive and, if so, how and what the anticompetitive effects are.

Because the Commission has preliminarily determined that the proposed rules are not anticompetitive and have no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. To the extent, however, any commenter may disagree with this assessment, the Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the proposed rules.

List of Subjects

17 CFR Part 43

Consumer protection, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 45

Data recordkeeping requirements, Data reporting requirements, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR chapter I as follows:

PART 43—REAL TIME PUBLIC REPORTING

■ 1. The authority citation for part 43 continues to read as follows:

Authority: 7 U.S.C. 2(a), 12a(5), and 24a, as amended by Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 2. Amend § 43.4 by revising paragraphs (c)(2), (c)(4) introductory text, (c)(4)(i), (c)(4)(ii) introductory text, and (c)(4)(iii) and adding paragraph (c)(5) to read as follows:

§ 43.4 Swap transaction and pricing data to be publicly disseminated in real-time.

* * * * *

(c) * * *

(2) *Actual product description reported to swap data repository.* For all publicly reportable swap transactions in the interest rate, credit, equity, and foreign exchange asset classes, reporting counterparties, swap execution facilities, and designated contract markets shall provide a swap data repository with swap transaction and pricing data that includes an actual description of the underlying asset(s). This requirement is separate from the requirement that a reporting counterparty, swap execution facility, or designated contract market shall report swap data to a swap data repository pursuant to section 2(a)(13)(G) of the Act and 17 CFR chapter I.

* * * * *

(4) *Reporting and public dissemination of the underlying asset(s) for certain swaps in the other commodity asset class.* Reporting counterparties, swap execution facilities, and designated contract markets shall provide a swap data repository, and a swap data repository shall publicly disseminate, swap transaction and pricing data in the other commodity asset class as described in this paragraph.

(i) Reporting counterparties, swap execution facilities, and designated contract markets shall provide a swap data repository, and a swap data repository shall publicly disseminate, swap transaction and pricing data for publicly reportable swap transactions in the other commodity asset class in the manner described in paragraphs (c)(4)(ii) and (iii) of this section.

(ii) The actual underlying asset(s) shall be provided and publicly disseminated for the following publicly reportable swap transactions in the other commodity asset class:

* * * * *

(iii) Reporting counterparties, swap execution facilities, and designated contract markets shall provide a swap data repository the actual underlying assets of swaps in the other commodity asset class that are not described in paragraph (c)(4)(ii) of this section, which shall be publicly disseminated by limiting the geographic detail of the underlying asset(s). The identification of any specific delivery point or pricing point associated with the underlying asset of such other commodity swap

[164] 7 U.S.C. 19(b).

shall be publicly disseminated pursuant to appendix E of this part.

* * * * *

(5) *Unique Product Identifiers and Product Classification System.* (i) When a unique product identifier and product classification system has been designated by the Commission to be used in recordkeeping and swap data reporting pursuant to regulation 45.7, reporting counterparties, swap execution facilities, and designated contract markets shall comply with the requirement to provide, and swap data repositories shall comply with any requirement to disseminate, an actual description of the underlying asset(s) by providing or disseminating, as applicable, swap transaction and pricing data that includes a unique product identifier and product classification system designated by the Commission.

(ii) For swaps described in paragraph (c)(4)(iii) of this section, when a unique product identifier and product classification system has been designated by the Commission to be used in recordkeeping and swap data reporting pursuant to regulation 45.7, reporting counterparties, swap execution facilities, and designated contract markets shall comply with the requirement to provide, and swap data repositories shall comply with their requirement to disseminate, a description of the underlying asset(s) that limits geographic detail pursuant to paragraph (c)(4)(iii) of this section by providing or disseminating, as applicable, swap transaction and pricing data that includes a unique product identifier and product classification system designated by the Commission that identifies any specific delivery point or pricing point pursuant to appendix E of this part.

(iii) Notwithstanding the requirements in paragraph (c)(5)(ii) of this section to provide and disseminate a unique product identifier and product classification system that limits geographic detail pursuant to appendix E of this part, reporting counterparties, swap execution facilities, and designated contract markets shall also comply with part 45 reporting obligations by providing to swap data repositories a unique product identifier and product classification system that does not limit the geographic detail of the underlying assets. The requirement established in paragraph (c)(5)(ii) of this section is separate from and in addition to the requirements set out in § 45.7.

* * * * *

■ 3. Revise appendix A to part 43 to read as follows:

Appendix A to Part 43—Swap Transaction and Pricing Data Elements

Allowable values for data elements are set forth in the technical specification published pursuant to § 43.7(a)(1) providing the form and manner for reporting and publicly disseminating the swap transaction and pricing data elements.

#	Data element name	Definition for data element
	Category: Clearing	
1	Cleared	Indicator of whether the transaction has been cleared, or is intended to be cleared, by a central counterparty.
14	Mandatory clearing indicator	An indicator of whether the swap transaction is subject to mandatory clearing under the Commission's regulations.
	Category: Custom baskets	
31	Custom basket indicator	Indicator of whether the swap transaction is based on a custom basket.
	Category: Events	
37	Action type	Type of action taken on the transaction or type of end-of-day reporting. Allowable values for action type are subject to removals and additions as set forth in the technical specification and might include, but not be limited to, new, modify, correct, error, terminate, revive, transfer out, valuation, and collateral/margin update.
38	Event type	Explanation or reason for the action being taken on the transaction. Allowable values for event type are subject to removals and additions as set forth in the technical specification and might include, but not be limited to, trade, novation/step-in, post trade risk reduction exercise, early termination, clearing, exercise, allocation, clearing & allocation, credit event, corporate event and transfer.
39	Amendment indicator	Indicator of whether the modification of the transaction reflects newly agreed upon term(s) from the previously negotiated terms.
41	Event timestamp	Date and time of occurrence of the event.
	Category: Notional amounts and quantities	
43	Notional amount	For each leg of the transaction, where applicable: —For OTC derivative transactions negotiated in monetary amounts, amount specified in the contract. —For OTC derivative transactions negotiated in non-monetary amounts, refer to appendix in the swap data technical specification for converting notional amounts for non-monetary amounts.
44	Notional currency	For each leg of the transaction, where applicable: currency in which the notional amount is denominated.
45	Notional amount schedule—notional amount in effect on associated effective date.	For each leg of the transaction, where applicable: For OTC derivative transactions negotiated in monetary amounts with a notional amount schedule: • Notional amount which becomes effective on the associated unadjusted effective date.
46	Notional amount schedule—unadjusted effective date of the notional amount.	For each leg of the transaction, where applicable: For OTC derivative transactions negotiated in monetary amounts with a notional amount schedule: • Unadjusted date on which the associated notional amount becomes effective.
47	Notional amount schedule—unadjusted end date of the notional amount.	For each leg of the transaction, where applicable: For OTC derivative transactions negotiated in monetary amounts with a notional amount schedule: • Unadjusted end date of the notional amount.
48	Call amount	For foreign exchange options, the monetary amount that the option gives the right to buy.
49	Call currency	For foreign exchange options, the currency in which the Call amount is denominated.

#	Data element name	Definition for data element
50	Put amount	For foreign exchange options, the monetary amount that the option gives the right to sell.
51	Put currency	For foreign exchange options, the currency in which the Put amount is denominated.
52	Notional quantity	For each leg of the swap transaction where applicable, for swap transactions negotiated in non-monetary amounts with fixed notional quantity for each schedule period.
53	Quantity frequency	For each leg of the swap transaction where applicable, the rate at which the quantity is quoted on the swap transaction.
54	Quantity frequency multiplier	For each leg of the swap transaction where applicable, the number of time units for the Quantity frequency.
55	Quantity unit of measure	For each leg of the transaction, where applicable: unit of measure in which the Total notional quantity and Notional quantity are expressed.
56	Total notional quantity	For each leg of the transaction, where applicable: aggregate Notional quantity of the underlying asset for the term of the transaction.
57	Notional quantity schedule—unadjusted date on which the associated notional quantity becomes effective.	For each leg of the transaction, where applicable: for OTC derivative transactions negotiated in non-monetary amounts with a Notional quantity schedule. • Unadjusted date on which the associated notional quantity becomes effective.
58	Notional quantity schedule—unadjusted end date of the notional quantity.	For each leg of the transaction, where applicable: for OTC derivative transactions negotiated in non-monetary amounts with a Notional quantity schedule. • Unadjusted end date of the notional quantity.
59	Notional quantity schedule—notional quantity.	For each leg of the transaction, where applicable: for OTC derivative transactions negotiated in non-monetary amounts with a Notional quantity schedule. • Notional quantity which becomes effective on the associated unadjusted effective date.
	Category: Packages	
69	Package indicator	Indicator of whether the swap transaction is part of a package transaction.
71	Package transaction price	Traded price of the entire package in which the reported derivative transaction is a component.
72	Package transaction price currency	Currency in which the Package transaction price is denominated.
73	Package transaction price notation	Manner in which the Package transaction price is expressed.
74	Package transaction spread	Traded price of the entire package in which the reported derivative transaction is a component of a package transaction. Package transaction price when the price of the package is expressed as a spread, difference between two reference prices.
75	Package transaction spread currency	Currency in which the Package transaction spread is denominated.
76	Package transaction spread notation	Manner in which the Package transaction spread is expressed.
	Category: Payments	
77	Day count convention	For each leg of the transaction, where applicable: day count convention (often also referred to as day count fraction or day count basis or day count method) that determines how interest payments are calculated. It is used to compute the year fraction of the calculation period, and indicates the number of days in the calculation period divided by the number of days in the year.
79	Floating rate reset frequency period	For each floating leg of the swap transaction where applicable, time unit associated with the frequency of resets.
80	Floating rate reset frequency period multiplier.	For each floating leg of the swap transaction where applicable, number of time units (as expressed by the Floating rate reset frequency period) that determines the frequency at which periodic payment dates for reset occur.
81	Other payment type	Type of Other payment amount.
82	Other payment amount	Payment amounts with corresponding payment types to accommodate requirements of transaction descriptions from different asset classes.
83	Other payment currency	Currency in which Other payment amount is denominated.
87	Payment frequency period	For each leg of the transaction, where applicable: time unit associated with the frequency of payments.
88	Payment frequency period multiplier	For each leg of the transaction, where applicable: number of time units (as expressed by the Payment frequency period) that determines the frequency at which periodic payment dates occur.
	Category: Prices	
89	Exchange rate	Exchange rate between the two different currencies specified in the OTC derivative transaction agreed by the counterparties at the inception of the transaction, expressed as the rate of exchange from converting the unit currency into the quoted currency.
90	Exchange rate basis	Currency pair and order in which the exchange rate is denominated, expressed as unit currency/quoted currency.
91	Fixed rate	For each leg of the transaction, where applicable: for OTC derivative transactions with periodic payments, per annum rate of the fixed leg(s).
92	Post-priced swap indicator	Indicator of whether the swap transaction satisfies the definition of "post-priced swap" in § 43.2(a).
93	Price	Price specified in the OTC derivative transaction. It does not include fees, taxes or commissions.
94	Price currency	Currency in which the price is denominated.
95	Price notation	Manner in which the price is expressed.
96	Price unit of measure	Unit of measure in which the price is expressed.

#	Data element name	Definition for data element
97	Price schedule—unadjusted effective date of the price.	For OTC derivative transactions with prices varying throughout the life of the transaction: • Unadjusted effective date of the price.
98	Price schedule—unadjusted end date of the price.	For OTC derivative transactions with prices varying throughout the life of the transaction: • Unadjusted end date of the price.
99	Price schedule—price	For OTC derivative transactions with prices varying throughout the life of the transaction: • Price in effect between the unadjusted effective date and unadjusted end date inclusive.
100	Spread	For each leg of the transaction, where applicable: For OTC derivative transactions with periodic payments: • Spread on the individual floating leg(s) index reference price, in the case where there is a spread on a floating leg(s); or • Difference between the reference prices of the two floating leg indexes.
101	Spread currency	For each leg of the transaction, where applicable: currency in which the spread is denominated.
102	Spread notation	For each leg of the transaction, where applicable: manner in which the spread is expressed.
103	Strike price	For options other than foreign exchange options, swaptions and similar products, price at which the owner of an option can buy or sell the underlying asset of the option. For foreign exchange options, exchange rate at which the option can be exercised, expressed as the rate of exchange from converting the unit currency into the quoted currency. For volatility and variance swaps and similar products, the volatility strike price is reported in this data element.
104	Strike price currency/currency pair	For equity options, commodity options, and similar products, currency in which the strike price is denominated. For foreign exchange options: Currency pair and order in which the strike price is expressed.
105	Strike price notation	Manner in which the strike price is expressed.
106	Strike price schedule—Unadjusted effective date of the strike price.	For options, swaptions and similar products with strike prices varying throughout the life of the transaction: • Unadjusted effective date of the strike price.
107	Strike price schedule—Unadjusted end date of the strike price.	For options, swaptions and similar products with strike prices varying throughout the life of the transaction: • Unadjusted end date of the strike price.
108	Strike price schedule—strike price	For options, swaptions and similar products with strike prices varying throughout the life of the transaction: • Strike price in effect between the unadjusted effective date and unadjusted end date inclusive.
109	Option premium amount	For options and swaptions of all asset classes, monetary amount paid by the option buyer.
110	Option premium currency	For options and swaptions of all asset classes, currency in which the option premium amount is denominated.
112	First exercise date	First unadjusted date during the exercise period in which an option can be exercised.
113	Option exercise end date	For American or Bermudan exercise type, the last date for exercise.
114	Option exercise frequency period	The frequency of exercise periods.
115	Option exercise frequency period multiplier	The number of time units for the exercise frequency period.
	Category: Product	
121	Index factor	The index version factor or percent, expressed as a decimal value, that multiplied by the Notional amount yields the notional amount covered by the seller of protection for credit default swap.
122	Embedded option type	Type of option or optional provision embedded in a contract.
123	Unique product identifier (UPI)	A unique set of characters that represents a particular OTC derivative.
130	Crypto asset underlying indicator	Indicator of whether the underlying of the derivative is crypto asset.
131	Physical commodity contract indicator	For each leg of the swap transaction where applicable, an indication of whether or not the trade being submitted: (1) references one of the contracts described in appendix B to this part; or (2) is economically related to one of the contracts described in appendix B to this part.
133	Maturity date of the underlier	For each leg of the swap transaction where applicable, in case of swaptions, maturity date of the underlying swap.
	Category: Settlement	
135	Settlement currency	Currency for the cash settlement of the transaction when applicable.
136	Settlement location	Place of settlement of the transaction as stipulated in the contract.
	Category: Transaction related	
138	Non-standardized term indicator	Indicator of whether the swap transaction has one or more additional term(s) or provision(s), other than those disseminated to the public pursuant to part 43, that materially affect(s) the price of the swap transaction.

#	Data element name	Definition for data element
139	Block trade election indicator	Indicator of whether an election has been made to report the swap transaction as a block transaction by the reporting counterparty or as calculated by either the swap data repository acting on behalf of the reporting counterparty or by using a third party.
140	Large notional off-facility swap election indicator.	Indicator of whether an election has been made to report the swap transaction as a large notional off-facility swap by the reporting counterparty or as calculated by either the swap data repository acting on behalf of the reporting counterparty or by using a third party.
141	Effective date	Unadjusted date at which obligations under the OTC derivative transaction come into effect, as included in the confirmation.
142	Expiration date	Unadjusted date at which obligations under the OTC derivative transaction stop being effective, as included in the confirmation.
143	Execution timestamp	Date and time a transaction was originally executed, resulting in the generation of a new UTI. This data element remains unchanged throughout the life of the UTI.
145	Platform identifier	Identifier of the trading facility on which the transaction was executed.
146	SEF or DCM indicator	An indication of whether the swap transaction was executed on or pursuant to the rules of a swap execution facility or designated contract market.
148	Prime brokerage transaction indicator	Indicator of whether the swap transaction satisfies the definition of ''mirror swap'' or ''trigger swap'' in § 43.2(a).

■ 4. Revise appendix E to part 43 the introductory text to read as follows:

Appendix E to Part 43—Other Commodity Geographic Identification for Public Dissemination Pursuant to § 43.4(c)(4)(iii)

To the extent reporting counterparties and swap data repositories are required to report or disseminate underlying assets in the other commodity asset class in a way that limits the geographic detail of the underlying assets pursuant to § 43.4(c)(4)(iii) or (c)(5)(ii), as applicable, information shall be provided or disseminated pursuant to tables E1 and E2 in this appendix. If the underlying asset of a publicly reportable swap transaction described in § 43.4(c)(4)(iii) has a delivery or pricing point that is located in the United States, such information shall be publicly disseminated pursuant to the regions described in table E1 in this appendix. If the underlying asset of a publicly reportable swap transaction described in § 43.4(c)(4)(iii) has a delivery or pricing point that is not located in the United States, such information shall be publicly disseminated pursuant to the countries or sub-regions, or if no country or sub-region, by the other commodity region, described in table E2 in this appendix.

* * * * *

PART 45—SWAP DATA RECORDKEEPING AND REPORTING REQUIREMENTS

■ 5. The authority citation for part 45 continues to read as follows:

Authority: 7 U.S.C. 6r, 7, 7a–1,7b–3, 12a, and 24a, as amended by Title VII of the Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376 (2010), unless otherwise noted.

■ 6. Amend § 45.7 by:
■ a. Revising the section heading;
■ b. Revising paragraph (b)(2);
■ c. Adding paragraph (b)(3); and
■ d. Revising paragraph (c)(2).

The revisions and addition read as follows:

§ 45.7 Unique product identifier and product classification system.

* * * * *

(b) * * *

(2) When the Commission determines that such a unique product identifier and product classification system is available, the Commission shall designate the unique product identifier and product classification system to be used in recordkeeping and swap data reporting pursuant to this part, by means of a Commission order that is published in the **Federal Register** and on the website of the Commission, as soon as practicable after such determination is made. The order shall include notice of this designation, the contact information of the issuer of such unique product identifiers, and information concerning the procedure and requirements for obtaining unique product identifiers and using the product classification system. The Commission may subject such designation order to conditions that ensure the unique product identifier and product classification system continue to meet the requirements set out in paragraph (a) of this section. The Commission may also set, in such designation order, a date on which such designation shall be effective.

(3) If the Commission determines that a unique product identifier and product classification system, subject to a designation order pursuant to paragraph (b) of this section, does not satisfy the requirements set forth in this section, the Commission may limit, suspend, or withdraw the designation order consistent with the Act after appropriate notice and opportunity to respond.

(c) * * *

(2) In the absence of a designated unique product identifier and product classification system, each registered entity and swap counterparty shall use the internal product identifier or product description used by the swap data repository to which a swap is reported in all recordkeeping and swap data reporting pursuant to this part.

■ 7. Revise appendix 1 to part 45 to read as follows:

Appendix 1 to Part 45—Swap Data Elements

Appendix 1 to Part 45—Swap Data Elements

Allowable values for data elements are set forth in the technical specification published pursuant to § 45.15(b)(1) providing the form and manner for reporting swap data elements.

	Data element name	Definition for data element
	Category: Clearing	
1	Cleared	Indicator of whether the transaction has been cleared, or is intended to be cleared, by a central counterparty.
2	Central counterparty	Identifier of the central counterparty (CCP) that cleared the transaction.
3	Clearing account origin	Indicator of whether the clearing member acted as principal for a house trade or an agent for a customer trade.

	Data element name	Definition for data element
4	Clearing member	Identifier of the clearing member through which a derivative transaction was cleared at a central counterparty.
5	Clearing member identifier source	Source used to identify the Clearing member.
6	Clearing swap USIs	The unique swap identifiers (USI) of each clearing swap that replaces the original swap that was submitted for clearing to the derivatives clearing organization, other than the USI for the swap currently being reported (as ''USI'' data element below).
7	Clearing swap UTIs	The unique transaction identifiers (UTI) of each clearing swap that replaces the original swap that was submitted for clearing to the derivatives clearing organization, other than the UTI for the swap currently being reported (as ''UTI'' data element below).
8	Original swap USI	The unique swap identifier (USI) of the original swap submitted for clearing to the derivatives clearing organization that is replaced by clearing swaps.
9	Original swap UTI	The unique transaction identifier (UTI) of the original swap submitted for clearing to the derivatives clearing organization that is replaced by clearing swaps.
10	Original swap SDR identifier	Identifier of the swap data repository (SDR) to which the original swap was reported.
11	Clearing receipt timestamp	The date and time, expressed in UTC, the original swap was received by the derivatives clearing organization (DCO) for clearing and recorded by the DCO's system.
12	Clearing exceptions and exemptions—Counterparty 1.	Identifies the type of clearing exception(s) or exemption(s) that the Counterparty 1 has elected.
13	Clearing exceptions and exemptions—Counterparty 2.	Identifies the type of the clearing exception(s) or exemption(s) that the Counterparty 2 has elected.
14	Mandatory clearing indicator	An indicator of whether the swap transaction is subject to mandatory clearing under the Commission's regulations.
	Category: Counterparty	
15	Counterparty 1 (reporting counterparty)	Identifier of the counterparty to an OTC derivative transaction who is fulfilling its reporting obligation via the report in question. In jurisdictions where both parties must report the transaction, the identifier of Counterparty 1 always identifies the reporting counterparty.
16	Counterparty 1 identifier source	Source used to identify the Counterparty 1.
17	Counterparty 2	Identifier of the second counterparty to an OTC derivative transaction.
18	Counterparty 2 identifier source	Source used to identify the Counterparty 2.
19	Counterparty 1 financial entity indicator	Indicator of whether Counterparty 1 is a financial entity as defined in CEA section 2(h)(7)(C).
20	Counterparty 2 financial entity indicator	Indicator of whether Counterparty 2 is a financial entity as defined in CEA section 2(h)(7)(C).
21	Buyer identifier	Identifier of the counterparty that is the buyer, as determined at the time of the transaction.
22	Seller identifier	Identifier of the counterparty that is the seller, as determined at the time of the transaction.
23	Payer identifier	Identifier of the counterparty of the payer leg as determined at the time of the transaction.
24	Receiver identifier	Identifier of the counterparty of the receiver leg as determined at the time of the transaction.
25	Submitter identifier	Identifier of the entity submitting the data to the swap data repository (SDR).
26	Counterparty 1 Federal entity indicator	Indicator of whether Counterparty 1 is: (1) One of the following entities: (a) An entity established pursuant to Federal law, including, but not limited to, the following: i. An ''agency'' as defined in 5 U.S.C. 551(1), a Federal instrumentality, or a Federal authority; ii. A government corporation (examples: as such term is defined in 5 U.S.C. 103(1) or in 31 U.S.C. 9101); iii. A government-sponsored enterprise (example: as such term is defined in 2 U.S.C. 622(8)); iv. A federally funded research and development center on the master list referenced in 48 CFR 35.017–6; and v. An executive department listed in 5 U.S.C. 101; or (b) An entity chartered pursuant to Federal law after formation (example: an organization listed in title 36 of the U.S. Code); or (2) An entity that was established by, or at the direction of, one or more of the entities listed in clause (1), or has an ultimate parent listed in its LEI reference data that is an entity listed in clause (1) or in the first part of this clause (2). Notwithstanding the foregoing, the Counterparty 1 Federal entity indicator data element does not include federally chartered depository institutions.
27	Counterparty 2 Federal entity indicator	Indicator of whether Counterparty 2 is:

	Data element name	Definition for data element
		(1) One of the following entities: (a) An entity established pursuant to Federal law, including, but not limited to, the following: i. An ''agency'' as defined in 5 U.S.C. 551(1), a Federal instrumentality, or a Federal authority; ii. A government corporation (examples: as such term is defined in 5 U.S.C. 103(1) or in 31 U.S.C. 9101); iii. A government-sponsored enterprise (example: as such term is defined in 2 U.S.C. 622(8)); iv. A federally funded research and development center on the master list referenced in 48 CFR 35.017–6; and v. An executive department listed in 5 U.S.C. 101; or (b) An entity chartered pursuant to Federal law after formation (example: an organization listed in title 36 of the U.S. Code); or (2) An entity that was established by, or at the direction of, one or more of the entities listed in clause (1), or has an ultimate parent listed in its LEI reference data that is an entity listed in clause (1) or in the first part of this clause (2). Notwithstanding the foregoing, the Counterparty 2 Federal entity indicator data element does not include federally chartered depository institutions.
28	Counterparty 1 designation	Indication of the reporting counterparty's designation.
29	Counterparty 2 designation	Indication of the second counterparty's designation.
30	Counterparty 2 special entity	An indication of whether Counterparty 2 is a special entity as defined in § 23.401(c) of this chapter.
	Category: Custom baskets	
31	Custom basket indicator	Indicator of whether the swap transaction is based on a custom basket.
32	Custom basket code	If the OTC derivative transaction is based on a custom basket, unique code assigned by the structurer of the custom basket to link its constituents.
33	Basket constituent identifier	An identifier that represents a constituent of an underlying custom basket, in line with the Underlier ID within the ISO 4914 UPI reference data elements, as maintained by the UPI Service Provider or in line with an identifier that would be reported as an Underlier ID (Other) where the UPI Underlier ID is 'OTHER'.
34	Basket constituent identifier source	The origin, or publisher, of the associated Basket constituent identifier, in line with the Underlier ID source within the ISO 4914 UPI reference data elements as maintained by the UPI Service Provider or in line with the allowable value that would be reported as an Underlier ID (Other) source where the UPI Underlier ID is 'OTHER'.
35	Basket constituent unit of measure	Unit of measure in which the number of units of a particular custom basket constituent is expressed.
36	Basket constituent number of units	The number of units of a particular constituent in a custom basket.
	Category: Events	
37	Action type	Type of action taken on the transaction or type of end-of-day reporting. Allowable values for action type are subject to removals and additions as set forth in the technical specification and might include, but not be limited to, new, modify, correct, error, terminate, revive, transfer out, valuation, and collateral/margin update.
38	Event type	Explanation or reason for the action being taken on the transaction. Allowable values for event type are subject to removals and additions as set forth in the technical specification and might include, but not be limited to, trade, novation/step-in, post trade risk reduction exercise, early termination, clearing, exercise, allocation, clearing & allocation, credit event, corporate event and transfer.
39	Amendment indicator	Indicator of whether the modification of the transaction reflects newly agreed upon term(s) from the previously negotiated terms.
40	Event identifier	Unique identifier to link transactions entering into and resulting from an event, which may be, but is not limited to, compression or other post trade risk reduction exercises, credit event, etc. The unique identifier may be assigned by the reporting counterparty or a service provider or CCP providing the service.
41	Event timestamp	Date and time of occurrence of the event.
	Category: Notional amounts and quantities	
42	USD equivalent regulatory notional amount	For the entire swap transaction (not leg by leg), provide the USD equivalent notional amount that represents the entire overall transaction for tracking notional volume.
43	Notional amount	For each leg of the transaction, where applicable: —For OTC derivative transactions negotiated in monetary amounts, amount specified in the contract. —For OTC derivative transactions negotiated in non-monetary amounts, refer to appendix in the swap data technical specification for converting notional amounts for non-monetary amounts.
44	Notional currency	For each leg of the transaction, where applicable: currency in which the notional amount is denominated.
45	Notional amount schedule—notional amount in effect on associated effective date.	For each leg of the transaction, where applicable: For OTC derivative transactions negotiated in monetary amounts with a notional amount schedule: • Notional amount which becomes effective on the associated unadjusted effective date.
46	Notional amount schedule—unadjusted effective date of the notional amount.	For each leg of the transaction, where applicable: For OTC derivative transactions negotiated in monetary amounts with a notional amount schedule: • Unadjusted date on which the associated notional amount becomes effective.

	Data element name	Definition for data element
47	Notional amount schedule—unadjusted end date of the notional amount.	For each leg of the transaction, where applicable: For OTC derivative transactions negotiated in monetary amounts with a notional amount schedule: • Unadjusted end date of the notional amount.
48	Call amount	For foreign exchange options, the monetary amount that the option gives the right to buy.
49	Call currency	For foreign exchange options, the currency in which the Call amount is denominated.
50	Put amount	For foreign exchange options, the monetary amount that the option gives the right to sell.
51	Put currency	For foreign exchange options, the currency in which the Put amount is denominated.
52	Notional quantity	For each leg of the swap transaction where applicable, for swap transactions negotiated in non-monetary amounts with fixed notional quantity for each schedule period.
53	Quantity frequency	For each leg of the swap transaction where applicable, the rate at which the quantity is quoted on the swap transaction.
54	Quantity frequency multiplier	For each leg of the swap transaction where applicable, the number of time units for the Quantity frequency.
55	Quantity unit of measure	For each leg of the transaction, where applicable: unit of measure in which the Total notional quantity and Notional quantity are expressed.
56	Total notional quantity	For each leg of the transaction, where applicable: aggregate Notional quantity of the underlying asset for the term of the transaction.
57	Notional quantity schedule—unadjusted date on which the associated notional quantity becomes effective.	For each leg of the transaction, where applicable: for OTC derivative transactions negotiated in non-monetary amounts with a Notional quantity schedule • Unadjusted date on which the associated notional quantity becomes effective.
58	Notional quantity schedule—unadjusted end date of the notional quantity.	For each leg of the transaction, where applicable: for OTC derivative transactions negotiated in non-monetary amounts with a Notional quantity schedule. • Unadjusted end date of the notional quantity.
59	Notional quantity schedule—notional quantity.	For each leg of the transaction, where applicable: for OTC derivative transactions negotiated in non-monetary amounts with a Notional quantity schedule. • Notional quantity which becomes effective on the associated unadjusted effective date.
60	Notional quantity schedule—days of week	For each leg of the swap transaction where applicable, OTC derivative transactions negotiated in non-monetary amounts with Notional quantity schedule: • Days of the week applicable for the delivery of power.
61	Notional quantity schedule—unadjusted effective date of days of week.	For each leg of the swap transaction where applicable, OTC derivative transactions negotiated in non-monetary amounts with Notional quantity schedule: • Unadjusted date on which the associated days of week becomes effective for the delivery of power.
62	Notional quantity schedule—unadjusted end date of days of week.	For each leg of the swap transaction where applicable, OTC derivative transactions negotiated in non-monetary amounts with Notional quantity schedule: • Unadjusted end date of the days of week for the delivery of power.
63	Notional quantity schedule—hours from thru.	For each leg of the swap transaction where applicable, OTC derivative transactions negotiated in non-monetary amounts with Notional quantity schedule: • Hours from through based in UTC applicable for the delivery of power.
64	Notional quantity schedule—unadjusted effective date of hours from thru.	For each leg of the swap transaction where applicable, OTC derivative transactions negotiated in non-monetary amounts with Notional quantity schedule: • Unadjusted date on which the associated hours from thru becomes effective for the delivery of power.
65	Notional quantity schedule—unadjusted end date of hours from thru.	For each leg of the swap transaction where applicable, OTC derivative transactions negotiated in non-monetary amounts with Notional quantity schedule: • Unadjusted end date of the hours from thru for the delivery of power.
66	Notional quantity schedule—load profile type.	For each leg of the swap transaction where applicable, OTC derivative transactions negotiated in non-monetary amounts with Notional quantity schedule: • Load profile type applicable for the delivery of power.
67	Notional quantity schedule—unadjusted effective date of load profile type.	For each leg of the swap transaction where applicable, OTC derivative transactions negotiated in non-monetary amounts with Notional quantity schedule: • Unadjusted date on which the associated load profile type becomes effective for the delivery of power.
68	Notional quantity schedule—unadjusted end date of load profile type.	For each leg of the swap transaction where applicable, OTC derivative transactions negotiated in non-monetary amounts with Notional quantity schedule: • Unadjusted end date of the load profile type for the delivery of power.
	Category: Packages	
69	Package indicator	Indicator of whether the swap transaction is part of a package transaction.
70	Package identifier	Identifier (determined by the reporting counterparty) in order to connect: • Two or more transactions that are reported separately by the reporting counterparty, but that are negotiated together as the product of a single economic agreement. • Two or more reports pertaining to the same transaction whenever jurisdictional reporting requirement does not allow the transaction to be reported with a single report to TRs. A package may include reportable and non-reportable transactions.
71	Package transaction price	Traded price of the entire package in which the reported derivative transaction is a component.
72	Package transaction price currency	Currency in which the Package transaction price is denominated.
73	Package transaction price notation	Manner in which the Package transaction price is expressed.

	Data element name	Definition for data element
74	Package transaction spread	Traded price of the entire package in which the reported derivative transaction is a component of a package transaction. Package transaction price when the price of the package is expressed as a spread, difference between two reference prices.
75	Package transaction spread currency	Currency in which the Package transaction spread is denominated.
76	Package transaction spread notation	Manner in which the Package transaction spread is expressed.
	Category: Payments	
77	Day count convention	For each leg of the transaction, where applicable: day count convention (often also referred to as day count fraction or day count basis or day count method) that determines how interest payments are calculated. It is used to compute the year fraction of the calculation period, and indicates the number of days in the calculation period divided by the number of days in the year.
78	Fixing date	Describes the specific date when a non-deliverable forward as well as various types of FX OTC options such as cash-settled options that will "fix" against a particular exchange rate, which will be used to compute the ultimate cash settlement.
79	Floating rate reset frequency period	For each floating leg of the swap transaction where applicable, time unit associated with the frequency of resets.
80	Floating rate reset frequency period multiplier.	For each floating leg of the swap transaction where applicable, number of time units (as expressed by the Floating rate reset frequency period) that determines the frequency at which periodic payment dates for reset occur.
81	Other payment type	Type of Other payment amount.
82	Other payment amount	Payment amounts with corresponding payment types to accommodate requirements of transaction descriptions from different asset classes.
83	Other payment currency	Currency in which Other payment amount is denominated.
84	Other payment date	Unadjusted date on which the Other payment amount is paid.
85	Other payment payer	Identifier of the payer of Other payment amount.
86	Other payment receiver	Identifier of the receiver of Other payment amount.
87	Payment frequency period	For each leg of the transaction, where applicable: time unit associated with the frequency of payments.
88	Payment frequency period multiplier	For each leg of the transaction, where applicable: number of time units (as expressed by the Payment frequency period) that determines the frequency at which periodic payment dates occur.
	Category: Prices	
89	Exchange rate	Exchange rate between the two different currencies specified in the OTC derivative transaction agreed by the counterparties at the inception of the transaction, expressed as the rate of exchange from converting the unit currency into the quoted currency.
90	Exchange rate basis	Currency pair and order in which the exchange rate is denominated, expressed as unit currency/quoted currency.
91	Fixed rate	For each leg of the transaction, where applicable: for OTC derivative transactions with periodic payments, per annum rate of the fixed leg(s).
92	Post-priced swap indicator	Indicator of whether the swap transaction satisfies the definition of "post-priced swap" in § 43.2(a) of this chapter.
93	Price	Price specified in the OTC derivative transaction. It does not include fees, taxes, or commissions.
94	Price currency	Currency in which the price is denominated.
95	Price notation	Manner in which the price is expressed.
96	Price unit of measure	Unit of measure in which the price is expressed.
97	Price schedule—unadjusted effective date of the price.	For OTC derivative transactions with prices varying throughout the life of the transaction: • Unadjusted effective date of the price.
98	Price schedule—unadjusted end date of the price.	For OTC derivative transactions with prices varying throughout the life of the transaction: • Unadjusted end date of the price.
99	Price schedule—price	For OTC derivative transactions with prices varying throughout the life of the transaction: • Price in effect between the unadjusted effective date and unadjusted end date inclusive.
100	Spread	For each leg of the transaction, where applicable: For OTC derivative transactions with periodic payments: • Spread on the individual floating leg(s) index reference price, in the case where there is a spread on a floating leg(s); or • Difference between the reference prices of the two floating leg indexes.
101	Spread currency	For each leg of the transaction, where applicable: currency in which the spread is denominated.
102	Spread notation	For each leg of the transaction, where applicable: manner in which the spread is expressed.

	Data element name	Definition for data element
103	Strike price	For options other than foreign exchange options, swaptions and similar products, price at which the owner of an option can buy or sell the underlying asset of the option. For foreign exchange options, exchange rate at which the option can be exercised, expressed as the rate of exchange from converting the unit currency into the quoted currency. For volatility and variance swaps and similar products, the volatility strike price is reported in this data element.
104	Strike price currency/currency pair	For equity options, commodity options, and similar products, currency in which the strike price is denominated. For foreign exchange options: Currency pair and order in which the strike price is expressed.
105	Strike price notation	Manner in which the strike price is expressed.
106	Strike price schedule—Unadjusted effective date of the strike price.	For options, swaptions and similar products with strike prices varying throughout the life of the transaction: • Unadjusted effective date of the strike price.
107	Strike price schedule—Unadjusted end date of the strike price.	For options, swaptions and similar products with strike prices varying throughout the life of the transaction: • Unadjusted end date of the strike price.
108	Strike price schedule—strike price	For options, swaptions and similar products with strike prices varying throughout the life of the transaction: • Strike price in effect between the unadjusted effective date and unadjusted end date inclusive.
109	Option premium amount	For options and swaptions of all asset classes, monetary amount paid by the option buyer.
110	Option premium currency	For options and swaptions of all asset classes, currency in which the option premium amount is denominated.
111	Option premium payment date	Unadjusted date on which the option premium is paid.
112	First exercise date	First unadjusted date during the exercise period in which an option can be exercised.
113	Option exercise end date	For American or Bermudan exercise type, the last date for exercise.
114	Option exercise frequency period	The frequency of exercise periods.
115	Option exercise frequency period multiplier	The number of time units for the exercise frequency period.
116	Swap pricing method	For each leg of the swap transaction where applicable, the method used to price the floating leg.
117	Pricing date schedule of the swap	For each leg of the swap transaction where applicable, the adjusted date(s) on which the floating leg is priced.
118	Start and end time of the settlement window for the floating leg(s).	For each leg of the swap transaction where applicable, the time settlement window on which the floating leg is priced.
	Category: Product	
119	CDS index attachment point	Defined lower point at which the level of losses in the underlying portfolio reduces the notional of a tranche.
120	CDS index detachment point	Defined point beyond which losses in the underlying portfolio no longer reduce the notional of a tranche.
121	Index factor	The index version factor or percent, expressed as a decimal value, that multiplied by the Notional amount yields the notional amount covered by the seller of protection for credit default swap.
122	Embedded option type	Type of option or optional provision embedded in a contract.
123	Unique product identifier (UPI)	A unique set of characters that represents a particular OTC derivative.
124	Physical delivery location	For each leg of the swap transaction where applicable, the specific delivery location associated with the underlying asset for swaps in the other commodity asset class.
125	Pricing index location	For each leg of the swap transaction where applicable, the specific pricing index location associated with the underlying asset for swaps in the other commodity asset class.
126	Underlier ID (Other)	The asset(s), index (indices) or benchmark underlying a contract or, in the case of a foreign exchange derivative, identification of index.
127	Underlier ID (Other) source	The origin, or publisher, of the associated Underlier ID (Other).
128	Underlying asset price source	For an underlying asset or benchmark not traded on a platform, the source of the price used to determine the value or level of the asset or benchmark.
129	Underlying asset trading platform identifier	For a platform traded underlying asset, the platform on which the asset is traded.
130	Crypto asset underlying indicator	Indicator of whether the underlying of the derivative is crypto asset.
131	Physical commodity contract indicator	For each leg of the swap transaction where applicable, an indication of whether or not the trade being submitted: (1) references one of the contracts described in appendix B to part 43; or (2) is economically related to one of the contracts described in appendix B to part 43.
132	Product grade	For each leg of the swap transaction where applicable, the grade of the commodity to be delivered.
133	Maturity date of the underlier	For each leg of the swap transaction where applicable, in case of swaptions, maturity date of the underlying swap.
	Category: Settlement	
134	Final contractual settlement date	Unadjusted date as per the contract, by which all transfer of cash or assets should take place and the counterparties should no longer have any outstanding obligations to each other under that contract.
135	Settlement currency	Currency for the cash settlement of the transaction when applicable.
136	Settlement location	Place of settlement of the transaction as stipulated in the contract.

	Data element name	Definition for data element
	Category: Transaction related	
137	Allocation indicator	Indicator of whether the swap transaction is intended to be allocated, will not be allocated, or is a post allocation transaction.
138	Non-standardized term indicator	Indicator of whether the swap transaction has one or more additional term(s) or provision(s), other than those disseminated to the public pursuant to part 43, that materially affect(s) the price of the swap transaction.
139	Block trade election indicator	Indicator of whether an election has been made to report the swap transaction as a block transaction by the reporting counterparty or as calculated by either the swap data repository acting on behalf of the reporting counterparty or by using a third party.
140	Large notional off-facility swap election indicator.	Indicator of whether an election has been made to report the swap transaction as a large notional off-facility swap by the reporting counterparty or as calculated by either the swap data repository acting on behalf of the reporting counterparty or by using a third party.
141	Effective date	Unadjusted date at which obligations under the OTC derivative transaction come into effect, as included in the confirmation.
142	Expiration date	Unadjusted date at which obligations under the OTC derivative transaction stop being effective, as included in the confirmation.
143	Execution timestamp	Date and time a transaction was originally executed, resulting in the generation of a new UTI. This data element remains unchanged throughout the life of the UTI.
144	Reporting timestamp	Date and time of the submission of the report as reported to the trade repository.
145	Platform identifier	Identifier of the trading facility on which the transaction was executed.
146	SEF or DCM indicator	An indication of whether the swap transaction was executed on or pursuant to the rules of a swap execution facility or designated contract market.
147	SEF or DCM anonymous execution indicator.	An indicator of whether the swap transaction was executed anonymously on a SEF or a DCM.
148	Prime brokerage transaction indicator	Indicator of whether the swap transaction satisfies the definition of ''mirror swap'' or ''trigger swap'' in § 43.2(a) of this chapter.
149	Prior USI (for one-to-one and one-to-many relations between transactions).	Unique swap identifier (USI) assigned to the predecessor transaction that has given rise to the reported transaction due to a lifecycle event, in a one-to-one relation between transactions or in a one-to-many relation between transactions.
150	Prior UTI (for one-to-one and one-to-many relations between transactions).	UTI assigned to the predecessor transaction that has given rise to the reported transaction due to a lifecycle event, in a one-to-one relation between transactions or in a one-to-many relation between transactions.
151	Unique swap identifier (USI)	The USI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration. It consists of a namespace and a transaction identifier.
152	Unique transaction identifier (UTI)	A unique identifier assigned to all swap transactions which identifies the swap uniquely throughout its lifecycle and used for all recordkeeping and all swap data reporting pursuant to § 45.5.
153	Jurisdiction	The jurisdiction(s) that is requiring the reporting of the swap transaction.
	Category: Transfer	
154	New SDR identifier	Identifier of the new swap data repository where the swap transaction is transferred to.
	Category: Valuation	
155	Next floating reference reset date	The nearest date in the future that the floating reference resets on.
156	Last floating reference value	The most recent sampling of the value of the floating reference to determine cashflow.
157	Last floating reference reset date	The date of the most recent sampling of the floating reference to determine cashflow.
158	Delta	The ratio of the change in the price of an OTC derivative transaction to the change in price of the underlier.
159	Valuation amount	Current value of the outstanding contract without applying any valuation adjustments.
160	Valuation currency	Currency in which the valuation amount is denominated.
161	Valuation method	Source and method used for the valuation of the transaction by the reporting counterparty.
162	Valuation timestamp	Date and time of the last valuation marked to market, provided by the central counterparty (CCP) or calculated using the current or last available market price of the inputs.
	Category: Collateral and margins	
163	Affiliated counterparty for margin and capital indicator.	Indicator of whether the current counterparty is deemed an affiliate for U.S. margin and capital rules (as per § 23.159 of this chapter).
164	Collateralization category	Indicator of whether a collateral agreement (or collateral agreements) between the counterparties exists.
165	Initial margin collateral portfolio code	If collateral is reported on a portfolio basis, a unique code assigned by the reporting counterparty to the portfolio that tracks the aggregate initial margin of a set of open swap transactions.
166	Portfolio containing non-reportable component indicator.	If collateral is reported on a portfolio basis, indicator of whether the collateral portfolio includes swap transactions exempt from reporting.
167	Initial margin posted by the reporting counterparty (post-haircut).	Monetary value of initial margin that has been posted by the reporting counterparty. This refers to the total current value of the initial margin after application of the haircut (if applicable), rather than to its daily change.
168	Initial margin posted by the reporting counterparty (pre-haircut).	Monetary value of initial margin that has been posted by the reporting counterparty. This refers to the total current value of the initial margin, rather than to its daily change.

	Data element name	Definition for data element
169	Currency of initial margin posted	Currency in which the initial margin posted is denominated.
170	Initial margin collected by the reporting counterparty (post-haircut).	Monetary value of initial margin that has been collected by the reporting counterparty. This refers to the total current value of the initial margin after application of the haircut (if applicable), rather than to its daily change.
171	Initial margin collected by the reporting counterparty (pre-haircut).	Monetary value of initial margin that has been collected by the reporting counterparty. This refers to the total current value of the initial margin, rather than to its daily change.
172	Currency of initial margin collected	Currency in which the initial margin collected is denominated.
173	Variation margin collateral portfolio code	If collateral is reported on a portfolio basis, a unique code assigned by the reporting counterparty to the portfolio that tracks the aggregate variation margin related to a set of open swap transactions.
174	Variation margin posted by the reporting counterparty (pre-haircut).	Monetary value of the variation margin posted by the reporting counterparty. This data element refers to the total current value of the variation margin, cumulated since the first reporting of variation margins posted for the portfolio/transaction.
175	Currency of variation margin posted	Currency in which the variation margin posted is denominated.
176	Variation margin collected by the reporting counterparty (pre-haircut).	Monetary value of the variation margin collected by the reporting counterparty. This refers to the total current value of the variation margin, cumulated since the first reporting of collected variation margins for the portfolio/transaction.
177	Currency of variation margin collected	Currency in which the variation margin collected is denominated.

Issued in Washington, DC, on December 19, 2023, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Real-Time Public Reporting Requirements and Swap Data Recordkeeping and Reporting Requirements—Voting Summary and Chairman's and Commissioners' Statements

Appendix 1—Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson and Goldsmith Romero voted in the affirmative. Commissioners Mersinger and Pham voted to concur. No Commissioner voted in the negative.

Appendix 2—Statement of Support of Chairman Rostin Behnam

I support the proposed rule to amend certain requirements in the Commission's regulations regarding real-time public reporting and swap data reporting and recordkeeping. Today's action continues my commitment to improve the CFTC's dataset and ensure that the agency is a leader in data management and examination. This effort will bolster the CFTC's ability to monitor micro and macro risk and identify illegal conduct. In addition, today's proposal will promote international harmonization and market resilience, and ensure that the CFTC continues to receive accurate, complete, and high-quality data on swap transactions.

The proposed amendments to Parts 43 and 45 would allow a unique product identifier and product classification system (UPI) to be implemented for the Other Commodity asset class, in accordance with CFTC regulations. The Commission previously issued an order designating a UPI to be used in swap recordkeeping and data reporting for the Interest Rate, Credit, Foreign Exchange, and Equity asset classes, so today's proposal, if finalized, will allow the UPI to be extended to the Other Commodity asset class. The proposed amendments also would modify appendix A to Part 43 and appendix 1 to Part 45 to add certain data elements that will further international harmonization and increase data quality, accuracy, and standardization.

I look forward to hearing the public's comments on the proposed amendments to the regulations and the relevant appendices in Part 43 and 45 of the Commission's regulations. I thank staff in the Division of Market Oversight, Office of the General Counsel, and the Office of the Chief Economist for all of their work on the proposal.

Appendix 3—Statement of Commissioner Kristin N. Johnson

At its peak at the end of 2007, the notional amount outstanding in the credit default swaps market is estimated to have reached a staggering $61.2 trillion.[1] In 2008, the near collapse of largely bespoke over-the-counter (OTC) swaps market, most notably the credit default swap market, was a precipitating cause of the global financial crisis,[2] which the U.S. Government Accountability Office estimates resulted in roughly $10 trillion in losses, including large declines in employment and household wealth, reduced tax revenues from lower economic activity, and lost output.[3] An exemption from regulation for OTC swaps trading in bilateral markets obscured massively excessive risk-taking and undermined the integrity of global markets. The lack of reporting requirements for swap transactions left regulators with limited visibility into the OTC swaps market.

In the wake of this economic devastation, the G20 leaders met in Pittsburgh in 2009 and agreed to introduce order, transparency, and supervision in the bespoke, bilateral swaps market to ensure that regulators would never again be blind to emerging risks in this market. President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) into law on July 21, 2010. In recognition of the importance of having visibility into the swaps market, among many other things Dodd-Frank mandated centralized clearing and exchange-trading of many OTC derivatives, as well as requiring reporting of all swaps to swap data repositories (SDRs), including those not subject to or exempt from the clearing requirement.

As Dodd-Frank recognized, it is imperative that regulators understand the risk in the market in order to effectively regulate it, and empowered the CFTC to regulate swaps.[4] Taking up this mantle, the Commission adopted real-time public reporting and swap data reporting regulations in 2012, which are located in Parts 43 and 45 of the Commission's regulations.[5] Under these regulations, swap counterparties, swap execution facilities, and designated contract markets report publicly reportable swap transactions to SDRs.

The Commission's Division of Market Oversight (DMO), Division of Data (DOD), and Office of the Chief Economist (OCE) are responsible for reviewing the information received from the SDRs and monitoring it for systemic risk, with the goal in part to prevent another collapse from unseen exposure to

[1] Bank for International Settlements, *BIS Quarterly Review,* June 2018 at *https://www.bis.org/publ/qtrpdf/r_qt1806b.pdf.*

[2] *See* Financial Crisis Inquiry Commission, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, at xxiv–xxv, Feb. 25, 2011, *https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf* (concluding that OTC derivatives contributed ''significantly'' to the crisis by fueling mortgage securitization that provided protection against default, allowing the creation of synthetic collateralized debt obligations, and adding uncertainty when the housing bubble popped due to the derivatives comprising an unseen and unregulated market).

[3] Government Accountability Office, Financial Regulatory Reform: Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act (2013), *https://fraser.stlouisfed.org/title/gao-reports-testimonies-6136/financial-regulatory-reform-622249.*

[4] H.R. 4173 — 111th Congress: Dodd-Frank Wall Street Reform and Consumer Protection Act section 723 (swaps).

[5] *See* 17 CFR parts 43, 45; Final Rule, Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182 (Jan. 9, 2012); Final Rule, Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012).

particular market segments. Due to the nature of derivative contracts, risk can become multiplied several times over, untethered from the exposure to the underlying asset itself. Parts 43 and 45 achieve the necessary visibility for the Commission to effectuate its mandate under Dodd-Frank to monitor the swaps market through this reporting regime. In 2020, the Commission amended parts 43 and 45 to, among other things, streamline the requirements for reporting swaps, require SDRs to validate swap reports, permit the transfer of swap data between SDRs and generally harmonize the swaps data being reported with international guidance.[6]

The new proposed rule furthers the Commission's ongoing duty to effectively monitor the swaps market by promoting international harmonization, implementing unique product identifiers (UPIs) and allowing for geographic masking. The revisions specifically: (1) allow for geographic masking after designation of UPIs for swaps falling within the other commodity asset class, a key revision to avoid reports to SDRs of UPIs that contain detailed geographic information in contravention of Regulation 43.4(c)(4)(iii) and Appendix E to Part 43; (2) add reportable data fields to Appendix A to Part 43 and Appendix 1 to Part 45 from the current 2023 CDE Technical Guidance; and (3) implement non-substantive revisions to the descriptions of the existing reportable data elements in the forgoing appendices to harmonize with changes made at the international level. I am pleased to support this rule that allows us to continue to fulfill our ongoing commitment to protecting U.S. markets through regulatory oversight.

I commend the staff of the Division of Market Oversight, the Division of Data, and the Office of the Chief Economist for bringing to the Commission a thorough and reasoned proposal for further refining swap data reporting obligations. In particular, I would like to thank Isabella Bergstein, Owen Kopon, Alicia Viguri, and Chase Lindsey of DMO; Kate Michel and Robert Stowsky of DOD; and John Roberts and Lee Baker of OCE.

Appendix 4—Statement of Commissioner Goldsmith Romero

The CFTC proposes to strengthen swap dealer reporting requirements for commodity-based swaps—reporting that the CFTC uses for surveillance, oversight, and to avoid systemic risk. Swaps markets contributed to the 2008 financial crisis, and were previously opaque, leaving regulators blind to emerging risks.[1] Dodd Frank Act reforms required swap dealers to report transaction-level data to swap data repositories and the CFTC.

The proposed rule would require more granular data that will promote the Commission's ability to oversee and regulate swap markets. Last week, in remarks that referenced the CFTC's access to transaction-level data on swaps trades reported into registered trade repositories, Treasury Undersecretary of Domestic Finance Nellie Liang discussed the importance of data for financial stability saying, ''A key lesson from the global financial crisis is that opacity about critical markets and institutions resulting from lack of high-quality data can contribute to financial instability . . . Simply put, in a dynamic, interconnected economy such as ours, regulators cannot effectively safeguard financial stability or respond to crises if they do not have good data. . . .'' [2]

Accurate, timely, and high-quality data on swaps is fundamental to transparency, accountability, and the avoidance of systemic risk. The Dodd-Frank Act recognized that transparency is critical to fair and orderly markets, the resilience of swap dealers and other market participants, and the stability of the U.S. financial system.

After a decade since Dodd-Frank Act swap data reporting rules have been in effect, the CFTC is strengthening swap data reporting from both an enforcement and regulatory standpoint. The Commission has brought several recent enforcement actions for violating swap data reporting laws, including against JP Morgan,[3] Goldman Sachs,[4] Bank of America and Merrill Lynch,[5] and BNP Paribas.[6] Their failure to follow the law hurt the Commission's ability to carry out its Dodd-Frank Act mandate to ensure transparency in swap markets and to identify and reduce risks that could become systemic.

The CFTC must continuously guard against post-crisis complacency towards Dodd-Frank rules—rules that promote transparency, accountability, and financial stability. Swap dealers must do the same and are reminded that they need to comply with swap reporting laws or face an enforcement action.

On the regulatory side, the CFTC has been involved in international coordination efforts to obtain more granular detail on swap reporting.[7] As a result of that international coordination, on February 16, 2023, the Commission designated unique product identifiers for swap data reporting for credit, equity, foreign exchange, and interest rate swaps.[8]

The updates in this proposed rule would require unique product identifiers for commodity-based swaps, enabling the Commission to receive additional accurate and high-quality swap data. These updates reflect CFTC engagement with swap dealers, swap data repositories, and industry groups about the technical specifications and implementation of unique product identifiers.

For commodity-based swaps, the CFTC proposes to require high-quality data that would expose risk at a granular level. For example, one proposed new reporting field would include custom baskets that can be more bespoke in terms of the product and exposure risks. Another new proposed reporting field would be the ''Crypto asset underlying indicator'' for commodity swaps. This data would give the CFTC a level of insight that it does not currently have to safeguard against risks. The Financial Stability Oversight Council's 2023 Annual Report issued last week raised risks related to crypto-assets including ''the potential for fraud, illicit finance, sanctions evasion, operational failures, liquidity and maturity mismatches, and risks to investors and consumers, as well as contagion within the crypto-asset market.'' [9]

With these proposed updates, the Commission is furthering its Dodd-Frank mandate that CFTC's regulations promote transparency and financial stability. I thank the staff for their engagement and work. I encourage commenters to let the CFTC know if there are additional data elements or updates to the CFTC's technical instructions to ensure that the Commission will receive accurate and high-quality data that will enable the CFTC to increase transparency and financial stability.

Appendix 5—Concurring Statement of Commissioner Caroline D. Pham

I concur on the Notice of Proposed Rulemaking on Real-Time Public Reporting Requirements and Swap Data Recordkeeping and Reporting Requirements (Proposed Amendments to Parts 43 and 45 or NPRM) because I have concerns that the Commission is straying from the commitment we made to harmonizing data fields across Financial Stability Board (FSB) member jurisdictions.

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[1] During the 2008 Financial Crisis, the lack of aggregated and accessible swap markets data and information precipitated the collapse of Lehman Brothers, AIG, and others.

[2] *See* Remarks by Under Secretary for Domestic Finance Nellie Liang at the Brookings Institution, Dec. 14, 2023, available at, *https://home.treasury.gov/news/press-releases/jy1992.*

[3] *See* Statement of Commissioner Christy Goldsmith Romero in Support of Enforcement Case Against JP Morgan Chase for Violating Reporting & Supervision Rules Designated to Identify Systemic Risk, Sept. 29, 2023, available at, *https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement092923d,* and Statement of Commissioner Goldsmith Romero Regarding Enforcement Action Against JP Morgan Chase Bank, N.A., et al., for Swap Data Reporting Failures, July 5, 2022, available at, *https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement070522.*

[4] *See* Concurring Statement of CFTC Commissioner Christy Goldsmith Romero on *CFTC* v. *Goldman Sachs Over and Over Again,* Sept. 29, 2023, available at, *https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement092923c.*

[5] *See* Statement of Commissioner Goldsmith Romero in Support of Enforcement Case Against Bank of America and Merrill Lynch for Violating Reporting & Supervision Rules Designed to Identify Systemic Risk, Sept. 29, 2023, available at, *https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement092923b.*

[6] *See* Statement of Commissioner Christy Goldsmith Romero Regarding $6 Million Enforcement Action Against BNP Paribas for Swap Data Reporting and Disclosure Failures and Failure to Supervise, July 5, 2022, available at, *https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement070522b.*

[7] The CFTC has coordinated with the Financial Stability Board (FSB), the Committee on Payments and Market Infrastructure and the International Organization of Securities Commissions (CPMI–IOSCO), and the Regulatory Oversight Committee (ROC).

[8] *See* Commission Order Designating the Unique Product Identifier and Product Classification System To Be Used in Recordkeeping and Swap Data Reporting, available at, *https://www.cftc.gov/sites/default/files/2023/02/2023-03661a.pdf.*

[9] *See* FSOC's 2023 Annual Report (Dec. 14, 2023), available at, *https://home.treasury.gov/system/files/261/FSOC2023AnnualReport.pdf.*

[6] *See* 2020 SDRR Final Rule, 85 FR at 75503, 75504.

I would like to thank Owen Kopon, Alicia Viguri, Isabella Bergstein, and Chase Lindsey for their work on the NPRM. I appreciate their help working with me to make revisions to address some of my concerns, and I enjoyed the productive collaboration.

Swap data reporting is a unique area for me because I was at the Commission after the financial crisis when the Dodd-Frank Act first mandated it, and then became familiar with implementation issues in my roles after the I left the Commission.

I believe the harmonization issue needs to be resolved for me to support a final rule. These issues were covered at the November 6, 2023 Global Markets Advisory Committee (GMAC) meeting, with the GMAC adopting recommendations from the Technical Issues Subcommittee on how to address them and move forward.[1] Therefore, my statement today will begin with my view on how swap data reporting came to this juncture and why it is critical that we get it right, and end with what I would need to see to support a final rule, drawing on the GMAC's recommendations.

Background

In 2009, the G–20 leaders agreed to improve the resilience of the over-the-counter (OTC) derivatives market by, among other things, agreeing that all OTC derivatives transactions should be reported to trade repositories (TRs).[2] Aggregation of data reported to TRs can help authorities obtain a comprehensive view of the OTC derivatives market, including levels of activity in the market and overall size of counterparty credit exposures.[3]

In 2010, Congress passed the Dodd-Frank Act to implement the G–20 reforms.[4] In 2012, the Commission adopted the Part 43 and Part 45 regulations, requiring SDRs to publicly disseminate swap transaction and pricing data, and swap counterparties to report trade level swap data to SDRs.

While trade reporting implementation progressed in the early years, the lack of harmonization of data formats and data quality issues remained challenging.[5] Prior to the Dodd-Frank Act, swap market participants did not adhere to a standard methodology for electronically representing swap terms. As a result, the Commission provided flexibility in Parts 43 and 45 for SDR reporting to balance its need for data with the uncertainty surrounding standards. The initial swap data elements described the information that should be reported to SDRs in terms of legal requirements, instead of standard definitions, formats, and allowable values.[6]

With no standard approach for reporting, CFTC staff made assumptions to account for unstandardized data that was difficult to aggregate.[7] Commission staff was also faced with incomplete or missing fields in the SDR data. Market participants reported swaps to SDRs using different methods with varying degrees of success. For instance, many counterparties left fields blank for more complex swap terms, or entered random values to mark fields as filled.

At the same time, the Commission started bringing SDR reporting enforcement cases against swap dealers for failing to report, misreporting, or over-reporting swap data to SDRs.[8] The number of SDR reporting enforcement cases has only grown over time.[9] These cases send a strong message about the importance of accurate trade reporting so the Commission can monitor risk, but large-scale instances of noncompliance also call into question the quality of the data the Commission is using.

It has also been frustrating for market participants that the Commission has failed to communicate use-cases for the significant amounts of reported data that would justify the high cost of reporting. Part 45 was adopted with the understanding that regulatory reporting would fulfill the Commission's ''regulatory mandates, including systemic risk mitigation, market monitoring, and market abuse prevention.'' However, the Commission's messaging around SDR data has only gone from how to use the data to efforts to improve poor data quality.[10] The Commission still has not messaged a coherent strategy for using swap data to monitor risk, conduct surveillance, or ensure compliance with its regulations.

As the Commission adopted and implemented trade reporting requirements, CFTC staff led or participated in a number of international efforts to coordinate the global implementation of trade reporting.[11] When, at the request of the FSB, CPMI and IOSCO established a joint working group to mandate to develop guidance regarding the definition, format and usage of UTI, UPI and other critical OTC derivatives data elements (CDEs), the CFTC co-chaired the effort with the European Central Bank. The joint working group published multiple rounds of consultations on the technical aspects of UTI, UPI, and CDEs. Commenters to these consultations included many CFTC registrants and trade associations.

The CDE Technical Guidance came out of these workstreams, and provided regulatory authorities with uniform definitions, formats, and allowable values that can be used to represent many of the key terms of swaps.[12] Not only would this harmonize SDR data across FSB member jurisdictions, allowing market participants to report swap data to several jurisdictions in the same format, resulting in potential cost-savings, but it would also support the analysis of global systemic risk in swaps markets.

In 2020, the Commission published final rules amending various swap data reporting regulations to adopt the UTI Technical Guidance and CDE Technical Guidance, and align regulations with those of the SEC and ESMA.[13] A primary objective of the 2020 rule amendments was to reduce the number of fields currently reported to the CFTC, and focus on the minimum number of fields that allow the CFTC to perform its oversight functions, rather than capturing every data point on a swap.[14] Indeed, the final 2020

[1] *See* Commissioner Pham Announces Agenda for the Upcoming Global Markets Advisory Committee Meeting on November 6 (Nov., 6, 2023) (recommendations are at the link for ''Technical Issues Subcommittee Recommendations''), *https://www.cftc.gov/PressRoom/Events/opaeventgmac110623*.

[2] G–20 Leaders' Statement, The Pittsburg Summit, September 24–25, 2009.

[3] Financial Stability Board, Feasibility Study on Approaches to Aggregate OTC Derivatives Data (Sept. 19, 2014) at 1, *https://www.fsb.org/wp-content/uploads/r_140919.pdf*.

[4] CEA section 2(a)(13)(B) directs the Commission to make swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery. Section 2(a)(13)(G) mandates that all swaps, whether cleared or uncleared, be reported to SDRs. Section 4r further requires that uncleared swaps must be reported to SDRs, and sets forth the reporting obligation for doing so as between swap counterparties. Section 21(b) directs the Commission to prescribe standards for swap data recordkeeping and reporting.

[5] Financial Stability Board, Feasibility Study on Approaches to Aggregate OTC Derivatives Data (Sept. 19, 2014) at 3.

[6] Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012).

[7] For instance, DSIO's 2016 swap dealer de minimis report explained that the SDR data lacked key information necessary to conduct its analysis, including reliable notional data for non-financial commodity swaps, foreign exchange derivatives, and equity swaps. DSIO explained that ''[a]ccordingly, staff developed several assumptions and methodologies to approximate potential dealing activity across all five asset classes.'' Swap Dealer de minimis Exception Final Staff Report: A Report by Staff of the Commodity Futures Trading Commission Pursuant to Regulation 1.3(ggg) (Aug. 15, 2016) at 4–5, *https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/dfreport_sddeminis081516.pdf*.

[8] For instance, in 2018, the Commission sanctioned NatWest Markets, a provisionally registered swap dealer, for under-reporting, over-reporting, and misreporting tens of thousands of transactions to an SDR and failing to report hundreds of thousands of pre-enactment transactions to an SDR in a timely manner. In the Matter of: NatWest Markets Plc, formerly The Royal Bank of Scotland plc, Respondent, Order Instituting Proceedings Pursuant to sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (Sept. 14, 2018).

[9] *See* CFTC Releases Annual Enforcement Results (Oct. 20, 2022) (highlighting two swap data reporting cases in 2022).

[10] In 2017, the Wall Street Journal reported on a CFTC report that criticized the CFTC's swap data quality and use. The Wall Street Journal reported that ''[t]he inspector general's warning cited an internal 2016 CFTC report on swaps data showing that significant amounts of information were 'essentially unusable' due to the poor quality of the data.''

[11] Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503, 75504–05 (Nov. 25, 2020) (describing the efforts and the Commission's roles).

[12] The most-recent version of the CDE Technical Guidance was released in October 2023. CPMI–IOSCO, Harmonisation of Critical OTC Derivatives Data Elements (other than UTI and UPI), Revised CDE Technical Guidance—Version 3, (Oct. 2023), available at *https://www.leiroc.org/publications/gls/roc_20230929.pdf*.

[13] See Commission Letter 17–33, Division of Market Oversight Announces Review of Swap Reporting Rules in parts 43, 45, and 49 of Commission Regulations (July 10, 2017), available at *https://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/17-33.pdf*. Real-Time Public Reporting Requirements, 85 FR 75422 (Nov. 25, 2020); Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 (Nov. 25, 2020).

[14] See Commission Letter 17–33, Division of Market Oversight Announces Review of Swap

Continued

rules streamlined hundreds of different data fields required by the 2012 Part 43 and Part 45 rules into ''128 that truly advance the CFTC's regulatory goals.'' [15]

However, the Proposed Amendments to Parts 43 and 45 threaten to undo the progress made by expanding the data fields from 128 to closer to 200 by adding new data elements, many of which are specific to the CFTC and drive the Commission further away from international harmonization.

The GMAC's Recommendation

I am pleased with many aspects of the Proposed Amendments to Parts 43 and 45. The proposal, for instance, to make the UPI workable for the other commodity asset class is a creative solution to an operational challenge. I commend staff for proposing an idea, and encourage comments on whether it is practical and feasible.

However, I would only be able to support a final rule that incorporates the feedback from the GMAC's recommendations to the Commission for improving trade reporting, especially if supported by commenters.[16] Adding CFTC-specific data fields creates further obstacles and uncertainty for meaningful global aggregation and analysis of trade repository data, and unnecessarily increases compliance costs. As the GMAC heard, swap dealers have only just recovered from the significant effort to overhaul their reporting requirements and now are faced with the potential need to implement dozens of additional data fields. The CFTC already requires 47 data fields which are jurisdiction specific. If the NPRM were adopted as is, almost 40% of CFTC's data fields would be jurisdiction-specific, moving the CFTC further away from the opportunity to meaningfully aggregate data across-borders. The NPRM contradicts the efforts of global regulators to harmonize their requirements for global aggregation by establishing CDE and DMO's stated intention to streamline swap data reporting to achieve high quality data. I agree that every additional CFTC-specific field increases the complexity of the requirements and risks a degradation of the quality of the reported data.

I again thank the GMAC and the Technical Issues Subcommittee for their comprehensive recommendation, and look forward to the comments on the Proposed Amendments to Part 43 and 45.

[FR Doc. 2023–28350 Filed 12–27–23; 8:45 am]

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Reporting Rules in parts 43, 45, and 49 of Commission Regulations, at 8.

[15] Appendix 2—Statement of Chairman Heath P. Tarbert, Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 at 75596.

[16] The GMAC recommendation includes: (1) not adopting any CFTC-specific additional fields in the final rule; (2) not adopting the proposed commodities data elements, as there currently is no UPI compliance date for commodities, so adding data fields in the interim will only necessitate later changes; and (3) eliminating the requirement to report UPI attributes.

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Vol. 88 Thursday,
No. 248 December 28, 2023

Part V

The President

Proclamation 10688—Granting Pardon for the Offense of Simple Possession of Marijuana, Attempted Simple Possession of Marijuana, or Use of Marijuana

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Vol. 88, No. 248
Thursday, December 28, 2023

Presidential Documents

Title 3—

The President

Proclamation 10688 of December 22, 2023

Granting Pardon for the Offense of Simple Possession of Marijuana, Attempted Simple Possession of Marijuana, or Use of Marijuana

By the President of the United States of America

A Proclamation

In Proclamation 10467 of October 6, 2022 (Granting Pardon for the Offense of Simple Possession of Marijuana), I exercised my authority under the Constitution to pardon individuals who committed or were convicted of the offense of simple possession of marijuana in violation of the Controlled Substances Act and section 48–904.01(d)(1) of the Code of the District of Columbia (D.C. Code). As I have said before, convictions for simple possession of marijuana have imposed needless barriers to employment, housing, and educational opportunities. Through this proclamation, consistent with the grant of Proclamation 10467, I am pardoning additional individuals who may continue to experience the unnecessary collateral consequences of a conviction for simple possession of marijuana, attempted simple possession of marijuana, or use of marijuana. Therefore, acting pursuant to the grant of authority in Article II, Section 2, of the Constitution of the United States, I, Joseph R. Biden Jr., do hereby grant a full, complete, and unconditional pardon to all current United States citizens and lawful permanent residents who, on or before the date of this proclamation, committed or were convicted of the offense of simple possession of marijuana, attempted simple possession of marijuana, or use of marijuana, regardless of whether they have been charged with or prosecuted for these offenses on or before the date of this proclamation, in violation of:

(1) section 844 of title 21, United States Code, section 846 of title 21, United States Code, and previous provisions in the United States Code that prohibited simple possession of marijuana or attempted simple possession of marijuana;

(2) section 48–904.01(d)(1) of the D.C. Code and previous provisions in the D.C. Code that prohibited simple possession of marijuana;

(3) section 48–904.09 of the D.C. Code and previous provisions in the D.C. Code that prohibited attempted simple possession of marijuana; and

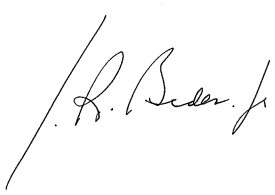
(4) provisions in the Code of Federal Regulations, including as enforced under the United States Code, that prohibit only the simple possession or use of marijuana on Federal properties or installations, or in other locales, as currently or previously codified, including but not limited to 25 C.F.R. 11.452(a); 32 C.F.R. 1903.12(b)(2); 36 C.F.R. 2.35(b)(2); 36 C.F.R. 1002.35(b)(2); 36 C.F.R. 1280.16(a)(1); 36 C.F.R. 702.6(b); 41 C.F.R. 102–74.400(a); 43 C.F.R. 8365.1–4(b)(2); and 50 C.F.R. 27.82(b)(2).

My intent by this proclamation is to pardon only the offenses of simple possession of marijuana, attempted simple possession of marijuana, or use of marijuana in violation of the Federal and D.C. laws set forth in paragraphs (1) through (3) of this proclamation, as well as the provisions in the Code of Federal Regulations consistent with paragraph (4) of this proclamation, and not any other offenses involving other controlled substances or activity beyond simple possession of marijuana, attempted simple possession of marijuana, or use of marijuana, such as possession of marijuana with intent to distribute or driving offenses committed while under the influence of

marijuana. This pardon does not apply to individuals who were non-citizens not lawfully present in the United States at the time of their offense.

Pursuant to the procedures in Proclamation 10467, the Attorney General, acting through the Pardon Attorney, shall review all properly submitted applications for certificates of pardon and shall issue such certificates of pardon to eligible applicants in due course.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of December, in the year of our Lord two thousand twenty-three, and of the Independence of the United States of America the two hundred and forty-eighth.



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Federal Register

Vol. 88, No. 248

Thursday, December 28, 2023

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FEDERAL REGISTER PAGES AND DATE, DECEMBER

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
10679 84679
10680 84681
10681 84683
10682 85091
10683 85817
10684 86257
10685 86810
10685 86541
10686 87653
10687 87893
10688 90083

Executive Orders:
12977 (Superseded and revoked by EO 14111) 83809
14024 (amended by 14114) 89271
14068 (amended by 14114) 89271
14090 (superseded by 14113) 89259
14111 83809
14112 86021
14113 89259
14114 89271

Administrative Orders:
Memorandums:
Memorandum of December 7, 2023 87651
Notices:
Notice of December 13, 2023 28609
Notice of December 18, 2023 87891

5 CFR

315 84685
335 84685
531 85467
2412 84067
3601 86029
Ch. CIII 85467

Proposed Rules:
335 89321
1302 87960
1303 87960

7 CFR

3 89275
205 ..... 86259, 89539
246 86545
272 86563
301 85469
905 89276
989 85819
3550 85470
Ch. XLII 86566
4279 86566

Proposed Rules:
271 87725
275 87725
923 85519
926 85130
927 83870
929 85130
930 84075
958 86066
987 89327
1005 84038
1006 84038
1007 84038

8 CFR

106 89539

10 CFR

50 85824
52 85824
72 86571
100 85824
429 84188
430 87502
431 84188
851 86811

Proposed Rules:
50 87967
52 87967
Ch. III 84082
429 87062
430 89330
431 87062
460 88844
1008 87371
1021 88854

12 CFR

3 89820
4 89820
6 89820
19 89820
108 89820
109 89820
112 89820
150 89820
165 89820
228 87895
238 89820
263 89820
308 89820
345 87895
609 85825
614 89280
620 89280
747 89820
1003 88221
1026 88223

Proposed Rules:
364 84089

13 CFR

Proposed Rules:
121 85852

14 CFR

Ch. I.....85474, 87668
13.....89551
21.....87655
39 .....83813, 83817, 83820, 83822, 84690, 84693, 85093, 85833, 85836, 86029, 86032, 86034, 86036, 86260, 86263, 86571, 86574, 86816, 86819, 87329, 87331, 87334, 87336, 87655, 89286, 89290, 89568
71 .....84071, 85094, 85472, 85473, 86039, 86578, 86579, 87338, 88527, 88528, 88529, 88531, 88532, 89292, 89293
73 .....84695, 87339, 88227
91.....89294
97 .....84233, 84234, 87665, 87666
383.....89551
406.....89551

Proposed Rules:

25.....86274
39 .....84759, 84761, 84764, 84767, 85856, 86069, 86073, 86080, 86084, 86088, 86840, 87725, 88271, 88274, 88276, 88541, 88544, 89339, 89627, 89632, 89633
71 .....83873, 83874, 83875, 85133, 85135, 85519, 85523, 85858, 85860, 87375, 87377, 87380, 87382, 87730, 87731, 88279, 88281, 88283, 88284, 88286, 88546, 88548, 88550, 88552, 88854, 89342, 89344
73.....88288
91.....84090
120.....85137
121.....84090
125.....84090
135.....84090

15 CFR

6.....89300
231.....89572
732.....86821
734.....86821
736.....86821
738.....85479
740 .....85479, 85487, 86821
742.....85479, 86821
744 .....85095, 85487, 86821, 87668, 87897
746.....86821
748.....86821
758.....86821
770.....86821
772.....86821
774.....85479, 86821

Proposed Rules:

740.....85734
744.....85734

16 CFR

423.....85495

Proposed Rules:

425.....85525
1110.....85760
1264.....85861
1408.....85862

17 CFR

200.....87156
201.....87156
230.....85396
232.....87156
240.....84454, 87156
242.....87156
249.....87156

Proposed Rules:

43.....90046
45.....90046

18 CFR

Proposed Rules:

33.....89346

20 CFR

404.....85104

20 CFR

Proposed Rules:

416.....83877
656.....88290

21 CFR

50.....88228
161.....86580
164.....86580
184.....86580
186.....86580
202.....89303
312.....88228
510.....84696
516.....84696
520.....84696
522.....84696
524.....84696
558.....84696
573.....87670
812.....88228
1308 .....85104, 86040, 86266

Proposed Rules:

101.....88613
1308.....86278

22 CFR

42.....85109
121.....84072
181.....87671

23 CFR

470.....87672
490.....85364
635.....87672
655.....87672

24 CFR

1000.....87900
1003.....87900
1006.....87900

Proposed Rules:

115.....85529
125.....85529
247.....83877
880.....83877
884.....83877
886.....83877
891.....83877
966.....83877

25 CFR

151.....86222

26 CFR

1 .....87696, 87903, 89636
54.....88494
301.....87696

Proposed Rules:

1 .....84098, 84770, 86844, 89220
5.....84770
301.....84770
602.....84770

28 CFR

543.....87903

29 CFR

9.....86736
2590.....88494
4044.....87340

Proposed Rules:

2510.....87968

30 CFR

56.....87904
57.....87904
77.....87904
946.....85838

Proposed Rules:

250.....86285
290.....86285

31 CFR

1.....88815
525.....87714
569.....87715
587.....89574
1010.....88732

32 CFR

286.....84236

Proposed Rules:

117.....86288
170.....89058

33 CFR

3.....87928, 88249
100 .....84238, 85110, 85496, 87928, 88249
117 .....85111, 85498, 86822, 88251, 89574
147.....87716
165 .....83825, 83827, 84238, 85112, 85500, 86046, 86048, 86580, 87341, 87343, 87719, 87928, 87930, 88249, 89576, 89578. 89579
401.....89551

Proposed Rules:

100.....86295
110 .....89644, 89646, 89648
117.....86301
165.....84249
334.....85115

34 CFR

Ch. III.....89305, 89306
662.....85502
663.....85502

36 CFR

7.....86050
212.....84704
214.....84704
251.....84704

37 CFR

380.....88253
385.....86058, 88253
386.....84710

38 CFR

3.....86058
4.....89307
21.....84239

Proposed Rules:

14.....88295
36.....85863

39 CFR

20.....87344
111.....85508, 88825
233.....85851

Proposed Rules:

111.....84251, 86868
3050.....83887

40 CFR

9.....87346
19.....89309
52 .....83828, 84241, 84626, 85112, 85511, 86581, 87359, 87720, 87932, 87934, 88254, 88255, 89582, 89587, 89589, 89593
60.....86062
61.....86062
62.....85124
84.....88825
180.....86268, 87361
261.....84710
262.....84710
266.....84710
302.....87723
704.....84242
721.....87346

Proposed Rules:

52 .....86093, 86303, 86870, 87850, 87981, 87988, 88300, 88308, 88310, 89351, 89355
55.....86094
62.....86312
63.....83889, 88553
131.....85530, 88315
141.....84878
142.....84878
180.....87733
271.....86100

41 CFR

301–10.....87363
301–70.....87363

Proposed Rules:

300–3.....89650
301–11.....89650
301–50.....89650
301–52.....89650
301–70.....89650
301–71.....89650
301–73.....89650

42 CFR

430.....84713
435.....84713
493.....89976

Proposed Rules:

93.....84116
405.....89506
476.....89506
489.....89506
1001.....84116

43 CFR

10.....86452
8360.....87363

45 CFR

16.....84713

149.....88494

46 CFR

2.....89595
221.....89551
298.....86608
307.....89551
340.....89551
356.....89551

47 CFR

1.....85514, 89608
10.....86824
25.....84737, 87723
51.....83828
52.....85794
54.....83829, 84406
63.....85514
64 .....84406, 85794, 88257, 88261
73.....86064
74.....89610
97.....85126

Proposed Rules:

1.....85553
25.....85553
54.....85157
64.....86614
73.....84771
97.....85171

48 CFR

Ch. 1.....88708, 88729
1.....88708
7.....88708
22.....88708
36.....88708
52.....88708
205.....88533
211.....88533
212.....88533
225.....88533
245.....88533
252.....88533
1252.....88261

Proposed Rules:

203.....89357
204.....89357
207.....89357
212.....88554, 89357
215.....88554, 89357
227.....89357, 89358
234.....88554
252 .....88554, 89357, 89358
502.....88856
538.....88856
552.....88856
1401.....85172
1402.....85172
1403.....85172
1405.....85172
1414.....85172
1416.....85172
1419.....85172
1426.....85172
1431.....85172
1442.....85172
1443.....85172
1449.....85172

49 CFR

107.....89551
171.....89551
190.....89551
209.....89551
213.....89551
214.....89551
215.....89551
216.....89551
217.....89551
218.....89551
219.....89551
220.....89551
221.....89551
222.....89551
223.....89551
224.....89551
225.....89551
227.....89551
228.....89551
229.....89551
230.....89551
231.....89551
233.....89551
234.....89551
235.....89551
236.....89551
237.....89551
238.....89551
239.....89551
240.....89551
241.....89551
242.....89551
243.....89551
244.....89551
272.....89551
386.....89551
571.....84514
578.....89551

Proposed Rules:

215.....85561
674.....88337
675.....88337

50 CFR

17.....89611
216.....88262
217.....87937
300.....83830, 88832
622.....83860, 87365
635.....85517
648 .....84243, 86837, 87368, 88266, 88540, 88834
660 .....83830, 86838, 87369, 89313
665.....88835
679 .....84248, 84754, 88836, 88839, 88840, 88842, 89319

Proposed Rules:

17 .....84252, 85177, 88012, 88035, 88338
223.....85178
224.....85178
648.....83893
660.....89358
679.....84278, 85184

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at *https://www.archives.gov/federal-register/laws/current.html*.

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H.R. 1722/P.L. 118–32
Grand Ronde Reservation Act Amendment of 2023 (Dec. 26, 2023; 137 Stat. 1109)

H.R. 2839/P.L. 118–33
To amend the Siletz Reservation Act to address the hunting, fishing, trapping, and animal gathering rights of the Confederated Tribes of Siletz Indians, and for other purposes. (Dec. 26, 2023; 137 Stat. 1110)

H.R. 6503/P.L. 118–34
Airport and Airway Extension Act of 2023, Part II (Dec. 26, 2023; 137 Stat. 1112)

Last List December 27, 2023

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